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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Boston Home and School Association ("Association") which, since 1916, has been the elected city-wide governing body for the over one hundred multi-racial and multi-ethnic parent-teacher organizations of the Boston Public Schools, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this matter on January 14, 1976.

OPINIONS BELOW.

The January 14, 1976 opinion of the United States Court of Appeals for the First Circuit, as yet unreported, is re-

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produced as Appendix A to this Petition. The opinion of the United States District Court for the District of Massachusetts is reported at 401 F. Supp. 216. An earlier decision of the District Court in this litigation is reported at 379 F. Supp. 410.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals err in affirming the District Court's rejection of the Association's proof that the racial segregation found in particular Boston public schools was not the result of any state action, and in affirming the District Court's refusal to frame the remedy in terms of the specific effects of the constitutional violations that occurred, as commanded by *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974) and permitted by *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24-25 (1971)?

2. Did the Court of Appeals err by disregarding the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.*, in affirming the District Court's refusal to hear evidence as to the limited effect of state segregatory action on particular schools and the District Court's refusal to frame the remedy in terms of such specific effects?

3. Did the Court of Appeals err in affirming the District Court's rejection of the Association's proof, justified by *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 208 (1973), that would rebut the presumption that all school segregation in Boston was the result of governmental action?

4. Did the Court of Appeals err in affirming the District Court's imposition of a particular degree of racial balance on the entering classes to the examination schools, in contravention of the express mandate of *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 24-25 (1971), where the necessary result was the exclusion, solely because of their race, of better qualified white, oriental and American Indian students in favor of less qualified black and hispanic students?

5. Did the Court of Appeals err by affirming the District Court's refusal to consider the "white flight" likely to result from the mass, involuntary transportation of children based upon rigid racial assignment criteria, where evidence had been offered to permit a particularized remedy, and where recent sociological data indicates such a sweeping order is calculated to exacerbate rather than remedy segregation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Equal Educational Opportunities Act of 1974:

> Relevant Provisions of The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758, are reproduced as Appendix B to this Petition.

STATEMENT.

Plaintiffs below brought this action on March 25, 1972, against the Boston School Committee, its individual members, and the Superintendent of the Boston Public Schools (hereinafter the School Committee), and against the Board of Education and the Commissioner of Education of the Commonwealth of Massachusetts, seeking declaratory and injunctive relief against alleged discrimination in the operation of the Boston Public Schools in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1981, 1983, and 2000d.

I. Proceedings Respecting Liability.

The trial commenced on February 8, 1973, and concluded on March 22, 1973, although it was briefly reopened on June 20, 1973, in order to receive evidence regarding the proposed use of a new high school and regarding other specific details. The Association was not a party to any of the liability pro-

ceedings, it being permitted to intervene only later, in connection with the remedy proceedings, on December 27, 1974.

On June 21, 1973, this Court announced its decision in *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, where it held that a showing of substantial segregative activity affecting a part of a school system creates a presumption that the entire school system is a completely "dual" one, to be dismantled "root and branch", unless a defendant can meet a burden of proof to rebut this presumption with respect to one or more particular parts of such school system.

On June 14, 1974, the District Court announced its decision in this case, wherein, by utilizing retroactively the presumption first announced by the Supreme Court in *Keyes,* it concluded that the Boston public schools in all areas of the city and at all levels, were a part of a "dual school system", and instructed the School Committee to draft a remedial plan which should result "ideally [in] every school in the system . . . hav[ing] the same racial proportions" as the city-wide white-black student ratio, which was then two-thirds white and one-third minority.[1] 379 F. Supp. 410, at 483. As part of its interlocutory decree, the Court also ordered into effect an extensive, though temporary, busing plan for the 1974-1975 school year. *Id.,* at 484.

The District Court's findings which bore on the scope and extent of the remedy were unanticipated not only because *Keyes* was still undecided at the time of trial, but also because the District Court had, at the time of trial, specifically

[1] The ratio in the school system is now 45% white, 55% minority. (School census statistics filed in the District Court on February 9, 1976).

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limited the trial to the issue of liability, and indicated that the remedy would be fashioned in a subsequent separate proceeding.

The Court of Appeals for the First Circuit, on December 19, 1974, affirmed the District Court's June 14, 1974, liability holding with regards to each of the five areas of the school system as to which the District Court had found substantial, intentional segregation.[2] The Court of Appeals pointed out, however, that "[h]aving found such deliberate design, the court left the question of remedy to a future time." (509 F. 2d 580 at 583).

II. Proceedings Respecting Remedy.

Meanwhile, by order dated October 31, 1974, the District Court reiterated that the student desegregation plan to be formulated by the School Committee

> ". . . shall utilize as a starting point and keep in mind the goal that the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at the grade level of schools, elementary, intermediate and secondary, throughout the system."

The Court set a deadline of January 20, 1975, for the filing of proposed desegregation plans by other interested parties.

The Association filed a plan premised on the equitable doctrine that the remedy should be designed to restore the victims of illegal racial segregation (i.e. non-white public

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[2] These five areas were: (1) facilities utilization and new structures; (2) districting and redistricting; (3) feeder patterns; (4) open enrollment and controlled transfers; and (5) faculty and staff hiring and assignments. In the sixth area, vocational and examination schools, the Court of Appeals upheld the finding of purposeful segregation in those schools, which the District Court had based upon the *Keyes* presumption. 509 F. 2d 580, 583-584.

school children and their parents) to the position they would have occupied in the absence of such conduct. The Association's plan, was, therefore, designed to restructure the racial composition of particular schools, insofar as possible, to that which those schools would have had in the absence of the acts of the School Committee which the Court found to be illegal, rather than to attempt to racially balance every one of Boston's 162 schools according to the then-existing city-wide ratios, as ordered by the Court.

At an evidentiary hearing scheduled at the Association's request, the Association, on February 5, 1975, offered to prove, by means of four witnesses, including two leading experts on urban residential segregation (Nathan Kantrowitz of Kent State University and Ralph Goetze of the Boston Redevelopment Authority) and eighteen exhibits (including a number of detailed maps showing ethnic and racial residential segregation in the city and its relationship to the racial concentrations found to exist in each locality's schools)[3], that the racial segregation found in a substantial number of Boston public elementary schools and in two of the district high schools (which schools would not have been subjected to busing in the Association's plan) was not the result of any discriminatory action on the part of the School Committee or any other governmental agency. After oral argument by counsel on the Association's legal contention, but before the commencement of testimony, the Court excluded all of this evidence and the Association made an offer of proof.[4] The Court also ruled that the Association's de-

[3] Some of these maps are reproduced as Appendices C-F to this Petition.

[4] The Association also put its submission in the form of a motion to re-open the trial to permit the submission of its proffered evidence, as well as in the form of a motion to amend the Court's guidelines for desegregation plans contained in the Court's previous orders, which motions were likewise denied by the District Court.

segregation plan should not even be considered by the panel of masters who thereafter, following two weeks of evidentiary hearings respecting the other proposed plans, filed their own proposed plan on March 31, 1975.

On May 10, 1975, the District Court issued its Student Desegregation Plan. This plan not only rejected most of the Masters' districts, thereby requiring the forced busing of thousands of additional students, but further ordered that children would be assigned to schools according to their race, by means of the employment of strict mathematical formulae, and imposed a mandatory racial quota (35% black and hispanic) on the acceptance of pupils to the three college preparatory "examination schools".

REASONS FOR GRANTING THE WRIT.

I. Certiorari Should Be Granted Because The Court Of Appeals, By Affirming The District Court's Rejection Of Proof That Racial Segregation Found In Particular Schools Was Not The Result Of Any State Action, And By Affirming The District Court's Refusal To Frame The Remedy In Terms Of The Specific Effects Of The Constitutional Violations That Occurred, Ignored The Mandate Of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) and Milliken v. Bradley, 418 U.S. 717, 746 (1974).

The District Court found specific evidence of segregative School Committee action affecting approximately 50 of the 162 public schools in Boston. While, by utilization of the *Keyes* presumption, it also made general findings that all students and all schools were substantially affected, it made

no attempt to delineate the effect of illegal state action on the school populations in most of the particular schools.[5]

The Association's evidence would have shown that, even if the School Committee had not intentionally segregated students, the racial composition of a majority of the elementary schools and two high schools would have been substantially the same as it actually was.

Boston is a city comprised of a number of ethnic neighborhoods, many of which have been in existence for over 100 years. Some of these neighborhoods are overwhelmingly white, others are black, others are Chinese, Hispanic, or other minority. Some of the white neighborhoods are overwhelmingly Irish, others Italian.[6] The Association's sociological-demographic evidence would have shown that these residential patterns evolved over many decades as a result of a number of factors, and that the somewhat higher concentration of blacks was largely due to their more recent arrival, rather than the effect of any School Committee or other governmental action. In addition, on a city-wide basis, detailed calculations of a mathematical index of the residential separateness of the blacks and whites in Boston, when compared with the black-white separateness actually found to exist in the elementary schools, showed that, overall, the actual black-white separateness in the elementary schools was less, rather than greater, than the residential

[5] The District Court's general finding as to all schools having been affected was justified by the Court's findings respecting discriminatory faculty assignments alone, which, of course, is no indication that the racial imbalance in particular schools resulted from official action.

[6] See, for instance, the maps showing the residential concentration of first and second generation Italians and Irish in Boston, Appendices C and D. Other maps not here reproduced showed typical Italian sections of Boston to be over 90% Italian and Irish sections to be over 60% Irish when third and subsequent generations were considered.

black-white separateness in the elementary school age population in the city as a whole.[7] This evidence rebuts any presumption that actions of the School Committee had a segregative impact on the elementary schools, except with regard to those schools found by the Court to have been particularly affected.

In order to ascertain the correlation of black-white residential separateness in particular areas of Boston to the actual segregation found in the school population of *particular* schools located in those areas, a transparent overlay was offered in evidence which indicated the location of each elementary school in Boston as of 1970, and indicated the percentage of non-white enrollment in each school. As could be seen by laying this transparent map over a map showing the concentrations of non-white 5-14 year olds in Boston in 1970 (Appendix E), with few exceptions the schools located in the areas of the city where the elementary school age population was overwhelmingly white were overwhelmingly white; the schools located in areas where the population was racially mixed were racially mixed (usually in approximately the same degree as the surrounding neighborhood); and schools in overwhelmingly non-white areas were overwhelmingly non-white. Appendix F hereto is Appendix E with the transparent overlay. To a surprisingly high degree then, the actual segregation found to exist in Boston's elementary schools could be shown to accurately reflect the racial composition of the neighborhoods.

When one considers that the School Department, at least since 1935, had the consistent policy of assigning elementary school children to schools less than a mile from home so as to avoid the use of bus transportation, except in a few situa-

[7] The detailed studies of indices of segregation between various ethnic and racial groups in Boston, which were offered in evidence, required approximately 600 hours of work by Professor Kantrowitz and his staff.

tions where certain schools were overcrowded or condemned, or in order to avoid having students walk through hazardous areas, the inescapable conclusion from the Association's evidence is that most of the elementary schools as to which no evidence of segregatory conduct was shown would have had substantially the same racial composition as they actually did have, even had the defendants committed no segregative acts.

It is submitted that the Court of Appeals wrongly interpreted the decisions of this Court in *Green* v. *County School Board,* 391 U.S. 430 (1968), *Davis* v. *School Commissioners of Mobile County,* 402 U.S. 33 (1971), and *Swann* v.*Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) as requiring the rejection of the Association's proof. On the contrary, in *Swann,* the leading "remedy" case, this Court was careful to limit the District Court's remedial decree to the "elimination of the discrimination inherent in the dual school systems", as opposed to the "myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds" (at 22). This Court stressed that "[o]ne vehicle can carry only a limited amount of baggage", and that a remedial decree "does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools" (at 22-23). See also this Court's language in *Green* which makes clear it is "state-imposed segregation", not all segregation, which is to be uprooted. 391 U.S. 430, at 438, 439.

In *Swann,* moreover, this Court held that, *after* a system has been found to be a dual system, and *after* a desegregation plan has been submitted, the party submitting the plan has an opportunity to present *evidence* that any schools which are left racially imbalanced by the plan (in the sense of being out of proportion with the overall white-to-black ratio) are not imbalanced as the result of present or past

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discriminatory action on the part of the School Committee (402 U.S. at 26).[8] This, of course, is precisely what the Association attempted to do here at the hearing on remedy in the District Court. Nor, contrary to the Court of Appeals decision (Appendix A, p. 28, fn. 21), is there any intimation in *Swann* that a southern school system which was, without any trial, conceded to have been completely segregated by state statute, should be treated *more* favorably at the remedy stage, than a northern school system which has been ascertained to be a "dual" one only after litigation and in part by means of the application of a legal presumption.

Again, in *Milliken* v. *Bradley,* 418 U.S. 717, 744 (1974), this Court stressed that

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and *extent* of the constitutional violation. *Swann,* 402 U.S., at 16", (emphasis added),

and concluded:

> "But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 418 U.S. at 746.

See also this Court's recent decision in *Franks* v. *Bowman Transportation Co.* (No. 74-728, decided March 24, 1976), where the Court held that, even after a finding of a pattern and practice of discrimination in hiring, an employer may show, at the remedy stage, that individuals of the class "presumptively entitled" to positions of seniority, would

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[8] "Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."

not, in fact, have occupied such positions even if there had been no discrimination. (Slip Opinion, Page 23).

But the District Court here, by rejecting the Association's evidence, made impossible the framing of a decree having the above objective, opting instead for a decree having as its goal the compulsory racial balancing of every Boston school in accordance with city-wide racial ratios.

II. Certiorari Should Be Granted Because The Court of Appeals Disregarded The Equal Educational Opportunities Act of 1974 In Affirming The District Court's Refusal To Hear Evidence As To The Limited Effect Of State Segregatory Action On Particular Schools And To Frame The Remedy In Terms Of Such Specific Effects.

Moreover, the provisions of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et. seq.*, relevant portions of which are reproduced in Appendix B hereto, indicate a clear congressional policy to prohibit large scale involuntary busing based on a broad-brush presumption, at least where, as here, evidence is available which would permit a delineation of the extent of the effects of such action on the schools of particular age level and locality. Thus, the Act, *inter alia,* expressly prohibits a district court from ordering busing beyond the next nearest school and provides:

> "In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the law." (20 U.S.C. § 1712)

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Yet the Court of Appeals emasculates this clear Congressional statement of national policy by interpreting the Act to require no examination of the "scope" or extent of the constitutional wrong which needs to be remedied. (App. A, pp. 17-18). Rather, the Court interprets the Act to require an examination only of "which type of remedy (e.g., busing, magnet schools, etc.)" should be employed, once the scope of the wrong is presumed. (App. A, p. 19). In this way, the District Court's discretionary power to issue a sweeping remedial order, which will necessarily involve massive busing based upon a broad-brush presumption, is held to "gain nothing from the Act which leaves that discretion unaffected." (App. A, p. 19).

We submit that the Circuit Court's reading of the statute disregards and indeed contradicts the mandate of Congress and results in the imposition of a racial balance in each school throughout the city entirely unrelated to the extent of segregation and the "particular denials of equal educational opportunity" which can be justifiably attributed to School Committee action. 20 U.S.C. § 1712, *cf.* 20 U.S.C. § 1754 (Appendix B hereto, pp. 3-5).

The Court of Appeals would justify the rejection of the Association's position by pointing out that "a remedy may sometimes properly exceed the violation" in that it may do more than eradicate the constitutional wrong, citing Sherman Act violations as an instance in which "remedial law places greater restrictions on primary activity than did the substantive law that was violated" (Appendix A, pp. 24-25, n. 19). Yet the "overkill" of the remedy here does not burden the wrongdoer, as in the Sherman Act example cited, but rather falls upon the parents and children of Boston who have been innocent of any wrongdoing. If, as the Court of Appeals states (Appendix A, p. 29), it is "the rights of the individual students that are in question", then a judicial remedy should not callously require the involuntary trans-

portation of thousands of innocent elementary students to schools they do not wish to attend, when it can be proven that the great majority of these children would have been permitted to attend their neighborhood schools in the absence of any discriminatory governmental conduct.

III. Certiorari Should Be Granted Because The Court Of Appeals Has Wrongly Interpreted This Court's Decision In Keyes v. School District No. 1 So As To Justify The District Court's Exclusion Of Evidence Which Was Calculated To Prove That The Segregation Found In Many Schools Was Not Caused By School Committee Action.

The Court of Appeals concedes that the Association's evidence would have been admissible if offered by the School Committee at the trial on liability, but holds that the proffer of evidence here, at the hearing on remedy, came too late (Appendix A, pp. 27-28).

But *Keyes* was not decided until June 21, 1973, while the evidence on the liability trial in the District Court had closed (with one minor exception) on March 22, 1973. Yet, in its June 14, 1974, opinion, the District Court retroactively framed its findings on the issues as framed by *Keyes*, and found a completely "*dual*" school system based on the presumption first announced in that case.

Counsel who conducted the defense of the liability trial could not have anticipated the sweeping *Keyes* presumption, since the defendant's burden of rebutting the segregatory effect of School Committee action on the schools of particular parts of a school system had not then been enunciated by this Court. Accordingly, defense counsel limited its evidence to the circumstances and intent surrounding the specific instances of misconduct alleged by plaintiffs, and made no attempt to prove the limited effects of that conduct on segregation in the approximately one hundred Boston elementary schools as to which plaintiffs had offered no

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evidence. Thus, no evidence as to the effect of residential segregation on particular schools was offered by the defendant at trial. As a result of the Court's ruling, the Association was effectively deprived of any chance to present evidence to underpin the less far-reaching desegregation plan which it proposed.[9]

In affirming, the Court of Appeals dismissed this argument of the Association as "utterly without merit", because the trial "had been reopened" at the time *Keyes* was decided, and the School Committee "did not seek reopening on the issues presented by *Keyes*; it described *Keyes* as a restatement of the principles of the Supreme Court decisions." (App. A, p. 32, fn. 26). But the reopening of evidence on June 20, 1973, was expressly limited to evidence regarding the proposed use of a new high school, and a few other specific details, whereas the District Court had earlier indicated that separate, subsequent proceedings would be held regarding remedy. If the School Committee failed to fully appreciate the drastic consequences which the *Keyes* decision would have on the remedy, or to comprehend that later evidence regarding the proper scope of the remedy might be thereby foreclosed, the parents and children of Boston should not be thereby required to suffer the penalty.[10]

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[9] The Court of Appeals' characterization of the Association's remedy as an attempt to "preserve intact every scrap of segregated education that somehow can be separated from government causation" (Appendix A, p. 30) is unfair. The Association has championed throughout these proceedings all voluntary methods of desegregation, including the magnet schools. It does object to involuntary transportation to balance schools whose imbalance results from no legal wrong, but merely reflects the neighborhood ethnic population.

[10] Nor is it easy to grasp how the District Court's application of *Keyes* could have been challenged on the first [liability] appeal, as further suggested by the Court of Appeals (Appendix A, p. 32, fn. 26), where no evidence on which to base such a challenge had at that time been offered.

IV. Certiorari Should Be Granted Because The Court Of Appeals Has Approved The Imposition Of A Particular Degree Of Racial Balance On The Entering Classes To The Examination Schools, In Contravention Of The Express Mandate Of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24-25 (1971).

In *Swann,* this Court said (402 U.S. at 24)

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and *we would be obliged to reverse.* The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." (Emphasis supplied.)

Yet the District Court has disregarded this injunction, and required that the examination schools admit a flat 35% black and hispanic students in their entering classes.[11] That this flat 35% requirement had no logical relationship to what would have been the case in the absence of segregatory acts by the School Committee is evident if one considers that the quota, if used in the 1974-1975 school year, would have resulted in the acceptance of *all* black and hispanic applicants scoring above the 45 percentile in the Secondary School Achievement Test ("SSAT") administered by the Educational Testing Service of Princeton, N.J., as opposed to the acceptance of only one in four other children scoring above this percentile. Conversely, the quota would have resulted in all of the non-black and non-hispanic students admitted (i.e., whites, orientals and American Indians) having scored above the 85 percentile.

[11] Though phrased in terms of "a minimum", the 35% is actually a flat requirement in view of the difficulty in finding a sufficient number of qualified black and hispanic applicants.

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Had the School Department engaged in such an admissions policy on its own, it could have been challenged as having engaged in the unconstitutional "reverse discrimination" alleged to have taken place in *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). Moreover, far from being a device intended to effectuate segregation, the SSAT exams had been instituted as a remedy, ordered by the Massachusetts Commission Against Discrimination, as part of a settlement of a discrimination proceeding before that agency.[12] (Appendix A, p. 43, fn. 36).

Nor can the result be justified by stating that the Secondary School Achievement Tests were not "validated". (Appendix A, p. 43). It is one thing to require proof that tests required for employment be related to the job skills involved, see *Castro* v. *Beecher,* 459 F. 2d 725 (1st Cir. 1972), and quite another to require validation of scholastic tests for admission to a program requiring scholastic ability. See *Chaney* v. *State Bar of California,* 386 F. 2d 962, 964 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968), *reh. den.,* 391 U.S. 929 (1968).

If the purpose of a remedial decree is to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct", *Milliken* v. *Bradley,* 418 U.S. 717, at 746, that purpose has been abandoned here in favor of a policy calculated to achieve a racial balance by any means, including "reverse discrimination" against better qualified white, oriental and American Indian students, who are excluded simply because of their race.[13]

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[12] This settlement had also required the reservation of a certain number of seats in the examination schools for underrepresented (i.e. black) sections of the city.

[13] The Court of Appeals admits that this directive "at face value - - - does appear to establish a fixed racial balance" (Appendix A, p. 41), but goes on to justify it as a "temporary expedient." (Appendix A, p. 44).

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V. Certiorari Should Be Granted Because The Mass Involuntary Transportation Of Children To Achieve Racial Balance, Instead Of Maximizing Freedom By Protecting The Free Exercise Of Constitutional Rights, Minimizes Freedom By Coercing Their Exercise. The Circuit Courts Are In Conflict On The Issue Of Whether The Resultant "White Flight" Is A Practicality That May Be Considered In Framing A Decree.

The original intent and purpose of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) was to open the doors of all-white schools to minority children who desired access, i.e. to eliminate state-imposed barriers to the *free exercise* of constitutional rights. See *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500 (1954), decided the same day as *Brown* I, and *Brown* v. *Board of Education* (*Brown* II), 349 U.S. 294, at 300 (1955). By almost imperceptible stages, the Court, in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), *Swann* v. *Charlotte-Mecklenburg,* 402 U.S. 1, and *Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33, moved away from the goal of protecting individuals from state interference with their free exercise of constitutional rights, to a position which is now widely interpreted by the district courts to require the coerced exercise of those rights through the involuntary transportation of students based on their race, without any regard for the wishes of the parents and children directly affected.

> ". . . It is one thing for the Constitution to say that, despite how the majority feels, it must allow black children into the public schools of their choice; and it is quite another for the Constitution to say, in the words of its interpreters, that children, owing to their race or ethnic group alone, may not be allowed to attend the schools of their choice. When, starting with the first proposition, one ends up with the second, as one

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has in San Francisco and Boston, one wonders if the Constitution can possibly have been interpreted correctly." Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy*, Chapter 3 "Affirmative Action in Education: The Issue of Busing", Page 109 (Basic Books, Inc., Publishers, New York, 1975).

It should not be surprising to anyone that one result of this judicial policy appears to be increased large-scale racial tensions and violence in the schools, reduction in educational achievement, and a flight of middle class students from the school systems involved. See, e.g., Dr. James Coleman's studies, affidavit and reply affidavits filed by the Association with the Court of Appeals and cursorily summarized at pp. 34-35, fn. 29 of the Court's opinion (Appendix A), and Coleman's address to a special joint session of The Massachusetts State Legislature on March 30, 1976, reported in *White Student Flight 31% Since Busing, Says Expert*, Boston Herald American, March 31, 1976; and (among many others) the following additional news reports: *12,526 Pupils Leave Boston Schools In Busing Crisis*, Boston Herald-American, January 15, 1976; *Busing And Strikes: School In Turmoil*, Time Magazine, September 15, 1975; *Busing: Why Tide Is Turning*, U. S. News & World Report, August 11, 1975; *Busing: Integrationists Now Have Their Doubts*, N. Y. Times, June 22, 1975; and *Integration, Yes: Busing, No*, New York Times Magazine, August 24, 1975.

In Boston there had been a loss of 8,638 white students between 1973 and 1974 (1974 being the first year of large scale Court ordered busing) as compared with much smaller losses of white students in earlier years. Later school statistics filed with the Court of Appeals indicate a continued massive exodus of white students (Appendix A, page 35,

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note 29).[14] Coleman, of course, had available even more recent school census figures when, on March 30, 1976, he computed the loss of white students from Boston public schools in just two years of Court-ordered busing at 31%.

Yet the Court of Appeals, though recognizing that "social problems" are created by remedies such as that ordered here, takes the position that white flight is not a relevant consideration, disclaiming any judicial responsibility for the havoc wrought on the ground that the resultant resegregation is "not constitutionally recognized". (Appendix A, p. 37). Indeed, the Court suggests it is up to "other institutions, city, state, federal and private", to pick up the pieces. (*Id.* p. 38).

We view this holding as being in conflict with the holding of the Fifth Circuit Court of Appeals in *Calhoun* v. *Cook*, 522 F. 2d 717, (5th Cir. 1975) where the Court traced the loss of white students from the system since 1958, and affirmed, based on Atlanta's history of white flight and other practical considerations, the District Court's plan which required *no* involuntary busing. See also Justice Marshall's recognition in his dissenting opinion in *Milliken* v. *Bradley*, 418 U.S. 717, at 801-802, that the courts cannot ignore white flight in fashioning a remedy.

While we do not dispute the decisions which hold that "white flight" cannot be permitted to excuse a failure to correct deprivation of constitutional rights, the real issue before the Court is whether the "particular denials of educational opportunity"[15] which occurred in Boston will really be effectively "corrected"[16] by the District Court's

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[14] The statistics referred to by the Court of Appeals indicated a loss of at least 12,907 white students and possibly as many as 17,906 white students between November 1, 1973, the last year before Court ordered busing, and October 17, 1975.

[15] 20 U.S.C., § 1712, Appendix B hereto, p. 3.

[16] *Ibid.*

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reassignment of thousands of students in an attempt to racially balance every Boston School. In *Swann* this Court recognized the practical limitations on what a judicial decree can hope effectively to accomplish, when it warned that a court should not attempt to eliminate all segregation caused by "the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds." 402 U.S. at 22. If, instead of correcting "particular denials of educational opportunity", the actual effect of the District Court's sweeping order is to heighten racial tensions, to cause turmoil in the schools, and, in the long run, to exacerbate the very racial isolation and segregation it is attempting to remedy, then it cannot be justified as a practical and effective remedy for past constitutional wrongs. *Calhoun* v. *Cook,* 522 F. 2d 717 (5th Cir. 1975).

CONCLUSION.

The decision of the Court of Appeals here is in conflict with the relevant holdings of this Court, with the holding of another Circuit Court, and with the Equal Educational Opportunities Act of 1974. In addition, the petition raises issues of crucial import to the everyday lives of the people of Boston, and to the nation.

Accordingly, a Writ of Certiorari should issue to the Court of Appeals in this case.

Respectfully submitted,

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Appendix A.

United States Court of Appeals for the First Circuit.

Nos. 75-1184, 75-1194,
Nos. 75-1197, 75-1212

TALLULAH MORGAN, et al.,
PLAINTIFFS, APPELLEES,
v.
JOHN J. KERRIGAN, et al.,
DEFENDANTS, APPELLANTS,

BOSTON HOME AND SCHOOL ASSOCIATION,
DEFENDANT-INTERVENOR, APPELLANT,

KEVIN H. WHITE, etc., et al.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

January 14, 1976

COFFIN, *Chief Judge*. These appeals present varied challenges to orders of the district court implementing a plan of desegregation for the public schools of Boston. The

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consolidated cases concern the remedy phase of litigation initiated by plaintiffs-appellees, representing a class of all black public school students and their parents, against, principally, the Boston School Committee and the Superintendent of Boston Public Schools. The liability phase came to an end in 1974 with a district court finding of substantial segregation in the entire school system intentionally brought about and maintained by official action over the years. *Morgan* v. *Hennigan,* 370 F. Supp. 410 (D. Mass. 1974).[1] We affirmed, *Morgan* v. *Kerrigan,* 509 F.2d 580 (1st Cir. 1974), and the Supreme Court denied certiorari, 421 U.S. 963 (1975).

While the liability issues were being considered on appeal, the district court, after its decision on June 21, 1974, began its exploration of appropriate remedies. The period from June, 1974, to May, 1975, was occupied with the addition of parties to the litigation,[2] hearings as to

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[1] The court specifically found that segregative policies had operated in the following respects: in the utilization of facilities and planning of new structures; in drawing and redrawing school district lines; in developing feeder patterns determining enrollments at specific high schools; in the open enrollment policy, the subsequent controlled transfer policy and the exceptions thereto; in the hiring, promotion, and assignment of black faculty and staff. Because of the operation of the second presumption in *Keyes* v. *School District No. 1,* 413 U.S. 189, 208 (1973), which it found had not been rebutted, the court also held that official intentional segregation infected the elite, citywide examination schools and vocational schools and programs.

[2] The original parties, in addition to the plaintiffs and the Boston defendants, included the State Board of Education (nominal defendants, although supporting the court's order and appellee here). Subsequently allowed to intervene were the Boston Teachers Union, the Boston Association of School Administrators and Headmasters, the Boston Home and School Association, and El Comite De Padres Pro Defense De La Education Bilingue. The Commissioners of the Public Facilities Commission, the Director of the Public Facilities Department, and the Mayor of Boston (hereinafter, collectively, the Mayor) were joined as parties defendant.

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the nature, scope and objectives of a plan, submission and criticism of various plans, consideration of all proposals and preparation of a plan by a panel of masters, and, finally, the issuance of a revised plan by the district court on May 10, 1975, followed by a Memorandum Decision and Remedial Order. *Morgan* v. *Kerrigan,* 401 F. Supp. 216 (D. Mass. 1975). On June 17, 1975, we denied appellants' motion for a stay pending appeal, *Morgan* v. *Kerrigan,* 523 F.2d 917 (1975), but devised a consolidated and expedited briefing schedule, in which all parties have faithfully cooperated. During the summer of 1975 the court, counsel, school officials, teachers, parent organizations, and federal, state, and city agencies and officials worked intensively to prepare for the September school opening in compliance with the district court's order, commonly referred to as Phase II.[3] The schools are now functioning in accordance with the court's plan and orders.

The issues to be considered here are both procedural and substantive and require some further background of events. After hearings during the summer and early fall of 1974, the district court, on October 31, 1974, entered an order establishing guidelines[4] and date (December 16) for a plan of desegregation to be filed by the School Committee. Such a plan was prepared by the staff but, on the deadline date, the School Committee voted not to

[3] Following the determination on liability in 1974, the district court ordered the implementation of a plan devised by the state for the 1974-1975 school year. This plan was commonly referred to as Phase I. *See* 379 F. Supp. at 483.

[4] The order provided that the "starting point" for its desegregation decree would be that "the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate, and secondary, throughout the system."

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submit it.[5] It was, however, filed by the Committee's counsel. This plan called for six districts, with varying learning approaches available within each district, and "magnet" or special purpose high schools, but left with parents the choice of schools for their children.

On January 20, 1975, plaintiffs submitted a plan, accepting the six districts identified in the staff plan of December 16, 1974, but proposing a mandatory allocation of students among the schools to achieve minority enrollments that were neither too small (e.g., a minimum of 29.4 percent in elementary schools) nor too large (e.g., a maximum of 60.6 percent in elementary schools).

Also on January 20, 1975, the Boston Home and School Association (Association) filed a plan which was based on the theory that segregation in certain schools was the result of "existing residential separateness" and a policy of neighborhood school assignments, rather than of any official actions of the School Committee. To support its approach, the Association offered evidence of demographic patterns, which the district court refused to accept on the grounds that the evidence was irrelevant at the remedy stage of the case and that the issue raised by the offer had been litigated and finally decided in the liability phase of these proceedings. The court's refusal to consider the Association's plan is not in issue, but the Association's contention that the court should reopen the proceedings to consider, for purposes of tailoring rem-

[5] This action by the School Committee led to contempt proceedings and a finding by the district court that three members were in continuing contempt of the order of October 31, 1974. This court denied a stay pending appeal of the civil contempt order. *Morgan* v. *Kerrigan*, 509 F.2d 618 (1st Cir. 1975). Subsequently, the district court found that they had purged themselves, and, ultimately, on January 27, 1975, the School Committee did submit a plan, different from the staff proposal filed by counsel.

edies, the impact of demographic conditions on particular schools is one of the principal issues before us.

The School Committee's plan, finally submitted on January 27, 1975, *see* note 5 *supra,* also kept the six districts or zones, and allowed parents several options, ranging from electing to have their child remain in a racially mixed school, to choosing a citywide or zoned magnet school, to *any* school within the zone. Should the school chosen by the parents be dominantly black or white, the desegregative remedy would be a once-a-week (for elementary schools) or a once-every-two-week (for middle level schools) visit by paired black and white schools to a "third site" resource center for training and experience in race relations.

With these three plans on the table, the court appointed two experts to assist in evaluating plans and a panel of four masters to consider the plans—commencing with the School Committee's January 27 plan—hold hearings, and "make recommendations to the Court".[6] The masters held hearings for over two weeks, and, after hearing argument addressed to a draft report, issued their final report on March 31, 1975. The masters found the School Committee plan inadequate, in large part because of its

[6] An objection was made by the School Committee to the naming of two of the masters on the ground that their association with the Harvard University Graduate School of Education constituted a disqualifying interest in the Harvard Center for Law and Education, which presently or formerly employed three attorneys representing plaintiffs. The School Committee also objected to the appointments of a third master and one expert because each had in the past supported the NAACP, which had provided financial assistance and counsel to the plaintiffs. The issue arising from the overruling of these objections will be dealt with later in this opinion. So also will be a further objection of the School Committee to the court's order awarding compensation to the masters.

reliance on parental free choice; rejected plaintiffs' plan as being educationally deficient, unwieldly and arbitrary; rejected the December 16 plan as being vague and unduly burdensome to minorities; and proposed a ten district system, one being a citywide district with magnet schools and specially appealing programs, with each of the other nine districts and some of the magnet schools being paired with specific colleges, labor and business organizations for assistance in program enrichment. Mandatory busing was estimated by the masters to affect 10,700 to 14,900 students.

The court then called for hearings on objections to the masters' report, which commenced on April 10. In the meantime, the court had called for updated enrollment data from the School Committee. The court issued its Draft Revision of the Masters' Report on April 17, heard comments on April 18, and issued its desegregation plan on May 10. Its plan reduced the number of districts from the ten recommended by the masters to nine, redrew district lines, and reflected—on the basis of the new data—less racial disparity generally in school assignments than did the masters' plan. The plan not only precisely set forth the new districts but called for changes in the school system's administrative hierarchy, and established a system of community participation in district and citywide councils. The mandatory busing estimated by the court would affect 21,000 students. During this time of accelerated activity, the court also appointed an ad hoc committee of three attorneys to assist in obtaining support from colleges and universities, and ordered that school personnel meet and confer with personnel from the designated college or university. Late in June the court authorized the court-appointed experts to resolve some remaining issues relating to facilities utilization, program

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allocation, and enrollment limits. Each of these actions by the court has been challenged, as well as the court's plan itself.

This skeletal recitation of chronology masks a year of increasingly intensive activity in collecting and updating data, preparing, evaluating, and amending plans embracing a wide variety of approaches, and, finally, devising procedures and taking action to put into effect a plan calling for a dramatically different educational system affecting some 80,000 students. The pressures of time, the problems of developing reliable data, the clash among radically differing approaches, the resistance of the School Committee, the sheer numbers of parents, students, teachers, and administrators to be informed and oriented were all part of the massive problems of implementation.

While we appreciate the labors that have taken place by all concerned, we also appreciate the necessity of giving the most careful consideration to the issues before us. Some are of large significance. Some are of little moment. For purposes of clarity, we summarize them, not necessarily in terms of importance, but in terms of their breadth and specificity.

A. *Broad challenges to the court's plan.*

1. The School Committee contends that its free choice-third site plan was constitutionally sufficient and should have been adopted.

2. The Mayor contends that, the masters' plan being constitutionally sufficient, the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*, deprived the court of power to issue its own plan.

3. The Association contends that the court's plan was erroneous because the court did not confine the remedy to eliminating the demonstrable effects of the School Committee's unlawful actions.

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4. The Association, the Mayor, and by implication, the School Committee, contend that the court's plan is defective in not having given weight to the impact of the departure of white students to other schools outside the Boston school system.

B. *Detailed challenges to the court's plan.*

1. The School Committee and the Association contend that the court erred in a mechanical resort to ratios. The Mayor and the Association object particularly to the use of ratios in effecting minority assignments to the high standard examination schools.

2. The School Committee challenges the appointment of three masters and one expert and objects to the compensation of all four masters.

3. The School Committee objects to the court's encroachment on its functions:

a. In specifying magnet programs;

b. In requiring the participation of colleges and universities;

c. In requiring the systematic involvement of a City-wide Coordinating Council and Community District Advisory Councils;

d. In requiring the hiring of additional supervisory personnel; and

e. In giving supervisory power to court-appointed experts.

* * * *

A. *Broad challenges to the court's plan.*

Four sweeping criticisms have been leveled at the court's plan. The simplest is that the School Committee's plan passed constitutional muster and the court could not justifiably require more. A similar argument, taking another point of reference, is that since the masters' plan was

constitutionally sufficient, the court could not, by reason of the Equal Educational Opportunities Act of 1974, require more. The remaining two broad scale attacks do not assert a barrier to going beyond any other plan but rely on the necessity for making further inquiries into remedial issues before a final plan is implemented. One type of prerequisite inquiry would be to ascertain the prior impact of official segregative action so that the remedy could be restricted to removing that impact. The other asserted prerequisite would be an inquiry into the likelihood of "white flight" so that a remedy may be tailored which, by minimizing such flight, would assure a maximum achievable co-education among the races.

1. *Sufficiency of the School Committee's Plan.*

Upon a finding that a school system has been operated in contravention of the equal protection clause of the Fourteenth Amendment to the constitution, the burden falls upon the local school authorities to present a plan of action to the district court to remedy the violations. *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). Only on the default of the School Committee to proffer an acceptable remedial plan is the district court empowered to fashion a remedy adequate to produce a unitary school system. *Id.* The threshold question, then, in reviewing the district court's action, is whether the rejection of the School Committee's plan of January 27 was proper.

In determining the acceptability of a proposed plan, the district court must assess the effectiveness of the plan in achieving desegregation. *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The district court, applying this standard, rejected the School Committee plan stating that it "presented no more than a hope for desegregation in Boston". 401 F. Supp. at 229. On review, we con-

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clude not only that the district court's assessment of the School Committee plan was proper, but that if the district court had accepted the January 27 plan, we would have been constrained to reverse. *See Keyes* v. *School District No. 1*, 521 F.2d 465 (10th Cir. 1975); *Jackson* v. *Marvell School District No. 22*, 416 F.2d 380 (5th Cir. 1969).

The plan submitted by the School Committee was, in summary, a freedom of choice plan supplemented by magnet schools and third site resource centers. The school assignment process was to be based upon a series of options available to the students and their parents. Starting with the option to remain in the school attended in the previous year if it had been desegregated under Phase I, the student could choose in succeeding options to attend a citywide magnet school, a zonal magnet school, a school in which his race is in the minority, and finally, any school in the zone. At the end of this five step, seven week process a review committee would determine a course of action to deal with over-subscribed schools.[7] In the event that schools remained "racially isolated", defined by the school department as more than a 15 percent deviation from the racial ratio for that level in the zone, the plan provided for mandatory student participation in resource center activities. The resource center proposal called for integrated educational experiences at a third site, once a week for elementary students, once every two weeks for middle school students and a human relations course

[7] According to this plan, various options were to be considered to deal with oversubscribed schools. These included the use of temporary classrooms, and extension of the school year to increase capacity. The use of temporary classrooms to enable white schools to operate in excess of their capacity was found to be one of the bases of liability in this action. *Morgan* v. *Hennigan*, *supra*, 379 F. Supp. at 427-28.

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for high school students. The entire plan rested on student and parental choice to desegregate the schools.

It is well established that freedom of choice plans to desegregate school systems are not per se unconstitutional. *Green, supra.* In order for such a plan to be constitutionally acceptable, however, it must promise to be as effective in achieving a unitary desegregated system as any alternative and feasible plan. *Id.* Freedom of choice has a long history of failure in achieving desegregation both in the south, *Swann, supra*; *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968); *Green, supra,*[8] and in other parts of the country, *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972) (Las Vegas); *Spangler* v. *Pasadena City Board of Education,* 375 F. Supp. 1304 (C.D. Cal. 1974). To be sure, it may be argued that voluntary plans were less promising in the South than in the North, as segregated dual systems were deeply entrenched there, having had an express legal basis. Yet as the district court's findings indicate, Boston had gone far in the creation of a de jure dual system. Boston, moreover, for ten years had a policy of open enrollment, followed by a controlled transfer policy riddled with exceptions. In an earlier stage of the present case the district court found that this policy served to increase, rather than decrease, segregation in the school system. *Morgan* v. *Hennigan, supra,* 379 F. Supp. at 449-59.

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[8] *Accord, Bivins* v. *Bibb County Board of Education,* 424 F.2d 97 (5th Cir. 1970); *United States* v. *Board of Education of Baldwin County,* 423 F.2d 1013 (5th Cir. 1970); *United States* v. *Hinds County School Board,* 417 F.2d 852 (5th Cir. 1969); *United States* v. *Jefferson County Board of Education,* 417 F.2d 834 (5th Cir. 1969); *Hall* v. *St. Helena Parish School Board,* 417 F.2d 801 (5th Cir. 1969); *Jackson* v. *Marvell School District No. 22,* 416 F.2d 380 (8th Cir. 1969); *United States* v. *Lovett,* 416 F.2d 386 (8th Cir. 1969); *Anthony* v. *Marshall County Board of Education,* 409 F.2d 1287 (5th Cir. 1969); *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir. 1969).

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The School Committee contends that its plan, although founded on freedom of choice, held promise to achieve desegregation due to the heavy reliance on magnet schools and alternative program schools — some fifty in number. Like freedom of choice, the use of magnet schools to achieve voluntary desegregation has failed elsewhere, *Bradley* v. *Milliken*, 484 F.2d 215, 243 (6th Cir. 1974), *rev'd on other grounds*, 418 U.S. 717 (1974); *Kelly* v. *Guinn*, *supra*; *Spangler* v. *Pasadena City Board of Education*, *supra*; *Dowell* v. *Board of Education*, 338 F. Supp. 1256, 1264 (W.D. Okla. 1972). *Compare Hart* v. *Community School Board*, 512 F.2d 37, 54-55 (2d Cir. 1975). Although Boston has had experience with one school which offered a specialized program and achieved a racially mixed student body,[9] we must agree with the district court that schools offering programmatic alternatives, while a useful supplement to an otherwise adequate desegregation plan, could not realistically sustain the burden of achieving desegregation of the Boston city schools.[10]

Finally, the School Committee plan to remedy "racial isolation" with part-time integrated resource centers added nothing to the effectiveness of the overall plan. The ob-

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[9] The Trotter School was designed to offer cultural enrichment programs for children from AFDC families. White students residing in AFDC homes from outside the city of Boston made up part of the student body. 379 F. Supp. at 430.

[10] The masters found:

> "The magnet concept as devised by the Committee is unrealistic and unworkable. Magnet programs could assist desegregation if they satisfied certain conditions. They must be limited in number, and they must be carefully placed, so that the effect of the applications they attract is to promote desegregation. The Committee Plan, which proposes the introduction of many magnet programs, satisfies none of these conditions, and could not possibly be put into operation by September, 1975."

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jective sought to be achieved in a remedial plan is desegregation, not interracial experience or racial balance. *Milliken* v. *Bradley*, 417 U.S. 717 (1974). Accordingly, similar part-time programs have been categorically rejected elsewhere, *Keyes* v. *School District No. 1, supra*, 521 F.2d at 477-79; *Arvizu* v. *Waco Independent School District*, 495 F.2d 499, 503 (5th Cir. 1974); *United States* v. *Texas Education Agency*, 467 F.2d 848, 859 (5th Cir. 1972), and must be rejected here.

Against this historical background which promised failure for every feature of the School Committee plan, it is inconceivable that anyone, the School Committee members or the court, could believe that the plan would be effective in eliminating and guarding against officially imposed segregation in Boston.[11] The district court, therefore, was clearly correct in declaring the School Committee in default of its obligation to present a constitutionally adequate plan. It was the district court's unquestionable duty to utilize all the resources available to it as to fashion expeditiously a remedy that realistically would produce a unitary school system. *Swann, supra.*

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[11] Comments of a member, and of the then Chairman, are revealing:

> "The plan is 'pie in the sky.' It is a contradiction, it is impossible. All of us would love to see a voluntary desegregation system put into effect. It is not a practical reality. Of course I will vote for this."
>
> "I would never vote for a plan that involved the busing of school children. It is unfortunate that is the way our society exists . . . but the only way you are going to desegregate city schools is through forced busing."

The only member of the School Committee to refuse to vote for the plan stated:

> "I agree that it would be an ideal solution and therefore will not vote against it, but I will vote 'present.' I believe we should have our votes consistent with what we feel is a reality." Remarks of Member Sullivan, Emergency Meeting of the Boston School Comm., January 7, 1975.

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2. *The Constitutional Adequacy of the Masters' Plan and the Applicability of the Equal Educational Opportunities Act of 1974.*

The Mayor's principal attack on the court's plan, essentially joined in by the Association, is that, since the masters' plan was constitutionally sufficient, the court was without power to require more busing than that contemplated by the masters. The source of this alleged limitation is the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758. The Act manifests an intention of Congress that mandatory busing not be ordered to a greater extent than is required by the constitution. Section 1712 states that a court shall "impose only such remedies as are essential to correct particular denials of equal educational opportunities or equal protection of the laws."[12] Section 1713 requires a court to consider, make specific findings about, and adopt a series of less onerous devices before requiring busing. These include school assignments close to home, transfers which would improve racial balance, revision of zones, and the construction of new schools and magnet schools.

The Mayor's argument proceeds simply: the masters' plan contemplated mandatory busing for 6,100 fewer students of the 84,000 total student population than did the court's plan; the court did not find that the additional compulsory transportation was required by constitutional necessity; and comparison with other cases demonstrates

[12] One provision, § 1714, facially proscribes any court ordered transportation of a student to a school other than one "closest or next closest to his place of residence" of the appropriate grade level and type of education. The Mayor properly concedes that this section must be read in conjunction with § 1702(b) which states that provisions of the Act "are not intended to modify or diminish the authority of the courts . . . to enforce fully . . . the Constitution. . . ."

that in fact the masters' plan was constitutionally sufficient; therefore the court exceeded its powers.[13]

The masters filed their final recommendations on March 31, 1975. On April 10 the school department furnished new statistics on the size and racial composition of the student body, on the basis of which the court modified the recommended plan. As noted by the district court in its May 28 order denying a stay, "the masters' re-

[13] The Association also argues that the adoption of the masters' plan was required by F. R. Civ. P. 53(e)(2), on the theory that the "delineation of districts was a factual determination" which could not be changed by the district court unless found to be clearly erroneous.

This argument misconceives the type of reference made in this case. Rule 53(e) provides that "[t]he order of reference to the master may specify or limit his powers", and that was done in this case. The Order of Appointment and Reference to Masters of February 7, 1975, specified that the masters were "to conduct hearings and make recommendations for a desegregation plan for Boston public schools together with the reasons for recommending that plan, including discussion of the key issues." This clearly described a mission not involving findings of fact meriting deferential treatment under Rule 53(e)(2). That rule's mandate simply "does not . . . apply where the master is directed only to report the evidence [and] to make recommendations . . . ." 5A J. Moore, Federal Practice ¶ 53.12[2], at 3002; *Matter of Van Swearingen Corp.*, 180 F.2d 119 (6th Cir. 1950). *See Hart* v. *Community School Board*, 383 F. Supp. 699 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). This reference was not a substitute for trial, where the master to a large extent takes over the fact-finding process; the district judge could not delegate his duty to evaluate for himself what actions had to be undertaken in order to remedy past failure to comply with the constitution. Indeed, we doubt that the determination of district boundaries is accurately described as purely factual in nature, given the nature of this case.

It is uncontested, moreover, that the figures on which the masters relied in drawing their districts were outdated and invalid in light of new figures submitted by the School Department shortly after the masters' final report was filed. Both as to racial composition and numbers of students in the districts, the new figures rendered the factual assumptions underlying the masters' determination clearly erroneous.

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port and recommendations contained the key elements and formed the foundation of the plan promulgated by the court." The most significant change effected by the court was a change in the number of geographic districts from nine to eight. The appellants assert that this change required more busing than the masters' plan would have required had it been updated to reflect the new figures. While this basic factual promise is open to some doubt, we need not rest our decision on such a necessarily elusive determination.[14]

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[14] The estimate of 6,100 additional students who would be bused under the court's plan (21,000-court minus 14,900-masters) ignores the impact of the new data, even had the masters' districts remained essentially intact. For example, the Burke district, eliminated by the court, had a capacity of 8,250 and an enrollment projected by the masters of 7,590. But the new statistics revealed it as containing 11,620 students. Even after assuming that some of the overflow would be absorbed by citywide magnet schools, there would remain perhaps 2,000 excess students. The Mayor does not show that shifts in district lines to accommodate these students either by merging contiguous neighborhoods and their schools into Burke or by removing fringe neighborhoods from it would not encounter the difficulty of increasing Burke's percentage of black students, already a high 63%. Although the amount of additional busing that would have been needed to take care of this situation is a matter of conjecture, it would appear to be substantial, if increased segregation were to be avoided.

Not only student population but racial concentration estimates of the masters were at odds with the realities of the new figures. The following discrepancies were found to exist:

	Master's final report	New figures applied by court to masters' districts	Possible result of allowed deviation of ± 10 percentage points within each school
West Roxbury	80% W	93% W	100% W
South Boston	60% W	67% W	77% W
Burke	50% B	63% B	73% B

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We proceed to examine the district court's duties and powers, as they are affected by the Equal Educational Opportunities Act of 1974; whether the court purported to be guided by the Act; and whether its findings and conclusions are sufficiently supported.

Prior to the passage of the Act it was clear that the mandate governing federal judges was to accomplish "the transition to a unitary, nonracial system of public education" in which "racial discrimination would be eliminated root and branch." *Green, supra,* 391 U.S. at 436, 438. They were to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971). And in so doing, "the scope of [their] equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann, supra,* 402 U.S. at 15 (1971).

The Act disavows any intention to encroach upon the obligation of the courts "to enforce fully" the constitution, § 1702(b). Moreover, it places reliance on specific findings with respect to the efficacy of particular remedies in the "priorities" section, § 1713, and on a more general finding of the inadequacy of other remedies in § 1755. By explicitly leaving the district court the power to determine the adequacy of remedies, the Act necessarily does

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The result, particularly when the± 10 point deviation is considered, represented substantial changes, unanticipated by the masters. While the masters gave greater weight to neighborhood identity than did the court, it is far from clear that they would have tolerated the higher concentrations shown by the new data.

The Mayor's assumption that the court's plan would involve anything close to the mandatory busing of 6,100 more students is therefore significantly vulnerable.

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not restrict the breadth of discretion of that court to determine what scope of remedy is constitutionally required. Thus the Act manifests a purpose not to limit judicial power but to guide and channel its exercise. In a sense it is a statutory "less restrictive means" guideline, endeavoring to ensure that substantial compulsory transportation be used as a last resort. Our reviewing function remains the limited one of scrutinizing the record for sufficient factual support for the scope of the remedy, its reasonableness and its feasibility. *See Swann, supra,* 402 U.S. at 31. The Act adds the factor that the district court's findings must reflect a substantial consideration of the less restrictive means which Congress has required to be explored and used prior to resorting to compulsory transportation of any magnitude.[15] We turn therefore to an analysis of these two areas.

Initially, we look to whether the remedy imposed in this case reflected the channelling contemplated by the Act. On this question, there can be little doubt. The district court clearly purported to be guided by the Act's mandate. In the course of presenting its plan, the court stated:

> "Assignment of every student to the school closest or next closest to his residence, considering only school capacity, natural physical barriers or both, along with grade level and the type of education provided, cannot achieve substantial desegregation in Boston due to the geography of the city and racial and ethnic

[15] As the court said in *Brinkman* v. *Gilligan*, 518 F.2d 853, 856 (5th Cir. 1975), "We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case."

distribution in the city. 20 U.S.C. § 1713(a)(b), § 1714. Revision of attendance zones and grade structures, construction of new schools and the closing of old schools, a controlled transfer policy with limited exceptions and the creation of magnet schools have been used in the formulation of the plan here adopted in order to minimize mandatory transportation. 20 U.S.C. § 1713. The court finds, however, that some transportation of students to schools other than those next closest to their residences is required to remedy adequately the denial of plaintiffs' constitutional rights and to eliminate the vestiges of a dual school system in Boston. 20 U.S.C. § 1702(b), § 1714(a)." 401 F. Supp. at 264.[16]

We do not understand the Mayor to contest these findings; nor would there be any basis in the record for such a challenge. Rather, the Mayor's theory goes less to which type of remedy (e.g., busing, magnet schools, etc.) was used by the court than to whether the remedial plan as a whole effectuated more desegregation (and as a result more busing) than was required. Since this argument concerns the district court's discretion in determining the adequacy of the remedy, and therefore gains nothing from the Act which leaves that discretion unaffected, it must stand or fall upon those traditional principles of equity which would govern this issue even were the Act not in

[16] Additional comments in the same vein are to be found in various parts of the court's opinion filed subsequent to the plan itself:

> "The plan that the court has ordered into effect reflects the court's continuing efforts to hold compulsory busing to a minimum." "The districts in this plan and the guidelines for assigning students have been drawn to minimize required transportation as much as possible consistently with desegregating the city's schools." "The plan adopted by the court attempts to minimize forced busing."

existence. We turn, therefore, to those principles and our traditional reviewing function.

It is important to understand what the court's plan accomplished. Assuming that it involves the forced busing of up to — but probably substantially fewer than — 6,100 more students than the masters' plan, what did it get in return? We see the plan as one involving relatively unskewed, contiguous, compact districts without extensive gerrymandering or satellite zoning. It should be borne in mind that compulsory busing occurs only within, not between, districts. Although both the masters' plan and the court's plan leave the East Boston schools 95 percent white, the court's plan eliminated the other virtually one-race schools (as would have existed under the masters' plan in West Roxbury, 93 percent white) and many racially identifiable schools (predictable for the masters' Burke district, 63 percent black). It reduced the racial distortion in the three districts which, under the masters' plan (as the new figures affected it), would have been markedly disproportioned. By reducing racial identifiability, the plan did more to avoid the dilemma of either denying a district's pupils access to citywide schools or allowing the district to lapse back into a one-race status. That the plan was not perfectionist is shown by the parameters of its district ratios, the percentage of whites ranging from a high of 61 percent to a low of 40 percent, in a school population 52 percent white, 36 percent black, and 12 percent other minority. Moreover, a 25 percent deviation was permitted for each district school. This compares with parameters in the masters' plan, when the newer School Department data are taken into account, which are substantially more extreme at both ends. As for the compulsory transportation, the maximum is a 5 mile, 25 minute trip, the average being 2½ miles, 10 to 15 minutes.

Could the district court have reasonably found this additional desegregation to be constitutionally required?[17] To put it another way, does the court's plan go beyond "every effort to achieve the greatest possible degree of

[17] The Mayor would have us answer this question in the negative by referring to other cases, affirmed by courts of appeals, where more schools were allowed to remain all black or more dominantly black than the masters' plan contemplated. Apart from the Mayor's assumption that the masters' plan contemplated no school more than about 53% black — an estimate which, in the light of the new data, should be closer to 73% — we reject such a simplistic color matching test to determine the constitutional sufficiency of any plan.

The cases cited by the Mayor reveal the hazard of picking as a control any one statistic of residual racial imbalance which another court may have approved. In three cases, *Mims* v. *Duval County School Board*, 329 F. Supp. 123 (M.D. Fla.), *aff'd*, 447 F.2d 1330 (5th Cir. 1971); *Goss* v. *Board of Education*, 482 F.2d 1044 (6th Cir. 1973) (en banc); and *Northcross* v. *Board of Education*, 489 F.2d 15 (6th Cir. 1973), geographic factors and, at least in *Mims* and *Northcross*, the desire to avoid extensive long distance busing were relied upon to justify the lesser degree of desegregation attempted. In two cases, *Pate* v. *Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970) and *Ross* v. *Eckels*, 434 F.2d 1140 (5th Cir. 1970), while more all black schools were permitted to remain, the courts of appeals had insisted on reducing the number of pupils attending such schools to around 5% of the total school population. Were we to take this statistic as a control, we would have to declare the court's plan, which leaves over 7% of the total student population attending the East Boston white schools, constitutionally inadequate. The remaining case, *Carr* v. *Montgomery Board of Education*, 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1374 (5th Cir. 1975), concededly insisted on a less stringent plan. Whether the desire to avoid cross-city busing would be, in our minds, sufficient to justify the lower objective, we have no reason to decide. The exercise of one district court's discretion, in a particular case, though affirmed on appeal, cannot establish constitutional limits for other courts facing other circumstances.

actual desegregation, taking into account the practicalities of the situation''? *Davis, supra,* 402 U.S. at 37. The ''practicality'' of white flight is not a viable basis for declaring the plan invalid. *See* part A 4, *infra.* Apart from the practicality of geography which induced the court to exempt East Boston from Phase II, we see no other geographical factor of significant dimensions. To the extent that funding is a problem, we note that virtually the entire expense of any incremental busing is fundable by the state Board of Education, which supports the court's plan. *See* Mass. G.L. c. 15, § 1I; c. 71, §§ 7A, 7B, 37I(ii). The amount of additional desegregation which was ''purchased'' by the court's plan was neither trivial nor disproportionately burdensome. When we ask ourselves whether a slight increase of maximum percentage of planned white enrollment at some schools, or leaving some elementary schools unaffected, or adding a few more magnet schools would achieve the constitutional minimum with less compulsory busing, we realize that the concept of the minimum cannot be identified with precision. Whatever prescription may be adopted by a judge, after months and years of consideration, it is doubtless always possible to make a case that something less will do. We have no basis for holding that the court exceeded its obligation to do all that it feasibly could to extirpate the effects of the constitutional violations over the years.

3. *Alleged Overbreadth of the Remedy.*

On January 20, 1975, the Association submitted a desegregation plan that was designed to restore the racial composition of the Boston schools to that which they would have had in the absence of any illegal official action. It contended that the district court was obliged to determine the extent to which the segregation in the Boston schools

was attributable to official action and to limit the remedy to eliminating only that segregation. The factual premise of the Association's plan was that the racial composition of most of Boston's elementary schools and of two of its high schools, Charlestown and East Boston, is the result of residential patterns in Boston and not of the illegal acts of the School Committee. Its plan, accordingly, provided that these schools should not be affected by the court's remedy.

Since the Association's plan challenged the remedial guidelines contained in the district court's order of October 31, 1974, the district court treated the Association's document as both a motion to modify the remedial guidelines prescribed by that order and as a proposed desegregation plan. The district court held a hearing on the issues presented by the Association on January 23, 1974. In support of its plan, the Association offered to introduce evidence that would establish that population patterns, not illegal state action, caused the existing racial segregation in the schools in question. The district court denied the motion to modify the remedial guidelines, holding that the Association's remedial theory was inconsistent with the controlling Supreme Court precedents.[18] The court also held that the Association's desegregation plan was constitutionally inadequate and could not be considered by the masters. Finally, the court refused to admit the Association's evidence, on the grounds that it was irrelevant since the only question before the court at that time was how to accomplish the greatest amount of actual desegregation consistent with the practicalities of the circumstances and that the motion represented an attempt to reopen the findings of fact made by the district court at

[18] The district court also ruled that modification was not required by the Equal Educational Opportunities Act of 1974. *See* note 24 *infra*.

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the liability stage of the proceedings and affirmed by this court. The Association has appealed, contending that the district court erred, first, in refusing to frame the remedy in terms of the specific consequences of the proven constitutional violations, and, second, in rejecting the evidence that the racial segregation in particular Boston schools was not the result of any state action.

The central question on appeal is whether the district court erred in refusing to accept the Association's remedial theory. In support of its theory that the district court must ascertain the extent to which state action caused the existing segregation in the schools and limit its remedy to eliminating that segregation, the Association relies upon the language of the Fourteenth Amendment itself. Since the amendment prohibits only state imposed racial segregation, *see Civil Rights Cases*, 109 U.S. 3 (1883), the Association contends that a district court's remedial power is limited to remedying the specific effects of the "state action" that formed the basis of the constitutional violation.

Although the theory possesses some surface plausibility, the Supreme Court precedents clearly establish that the district court was correct in rejecting the Association's proposed modification of its remedial guidelines. The remedial principles set forth in *Swann*, *Davis*, and *Green* do not tolerate anything less than ensuring that the effects of constitutional violations are eliminated, and we are certain that the application of the Association's remedial theories could not eradicate the effects of state imposed segregation.[19]

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[19] A remedy may sometimes properly "exceed the violation" in that it may do more than eradicate the constitutional wrong. To the extent that "overbreadth" in the remedy is necessary to ensure that the constitutional violation is corrected, it is not at all unusual. There are many instances in the law in which re-

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To appreciate why the Association's remedial theory must be rejected, it will be helpful to consider the nature of the constitutional violation. In the first stage of this case, the district court found that the School Committee's policies regarding the construction of new facilities, the use of portable classrooms, overcrowding, districting and redistricting, feeder patterns, open enrollment, transfers, and faculty and staff assignments "were all marked by segregative intent" and substantially contributed to the segregated character of dozens of Boston schools. 379 F. Supp. at 426-30, 433-37, 442-45, 455, 459, 466-68, and 472. The latter part of the district court's opinion dealt specifically with the School Committee's defenses that the racial segregation in the Boston schools — which it conceded to exist — resulted from private residential patterns and/or its racially neutral neighborhood school policy. The district court found that Boston had never followed a true neighborhood school policy and rejected the defense, relying in part on its earlier findings. 379 F. Supp. at 469-74. These specific findings, many of which related to elementary schools, were the basis for the determination that Boston's school system as a whole violated the Fourteenth Amendment. Although the defendants could have limited the geographic scope of the violation by proving that parts of the Boston school system were geographically unrelated to the rest of the system and had not been operated with "segregative intent," *Keyes, supra,* at 203-05 and 210-13, the School Committee failed

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medial law places greater restrictions on primary activity than did the substantive law that had been violated. For example, a company that is found to have violated the Sherman Act will have its future operations governed by a much more restrictive standard than that imposed by the Sherman Act itself. *See United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

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to satisfy this burden with respect to any portion of the system. We affirmed the district court's findings and legal conclusions in their entirety, *Morgan* v. *Kerrigan, supra.*

The Association, in effect, argues that the trial on liability should be treated as the first of two battles, and that the second battle should involve a more particularized inquiry into the causes of the segregation at the individual schools within the system. Although the defendants failed, at the trial on liability, to persuade the district court that private residential patterns alone caused the segregation in the Boston schools, the Association maintains that the district court must, at the remedy stage, reconsider the effects of non-official action, determine the degree to which private action caused the existing segregation, and fashion a remedy that preserves the segregation that can be separated from governmental causation. This second battle would be considerably more complicated than the first. The logical implication of the Association's proposal is that it would be proper for any group connected with any school to introduce proof that that school's racial profile was only partially attributable to official action. The district court could be faced with the task of making percentage findings as to every school in the district.

The short answer to the Association is that its position is squarely contrary to the remedial principles of *Swann*, *Davis*, and *Green.*[20] *See also Keyes, supra*, at 200 and

[20] The Association recognizes that *Swann*, *Davis*, and *Green* provide that, during the remedial phase of a school desegregation case, the district court must order the maximum practicable desegregation regardless of the degree to which the actual segregation in the schools is demonstrably the result of unlawful state action. The Association attempts to distinguish these cases on the ground that each involved school systems that had been segregated by statute for years. In such school systems, the Associa-

214. These cases establish that when intentional official action has significantly contributed to segregation in substantial portions of a school system, the individual schools in the system must be subjected to the maximum feasible desegregation if official action "created or maintained" the racial segregation contained therein. *Swann, supra,* at 21 and 28. *See Keyes, supra,* at 214. In the Boston case, the School Committee had the opportunity to prove that official action had not contributed to the segregated character of some of the individual schools in the system,

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tion contends that the application of these remedial principles was warranted because all segregation could be presumed to be the result of illegal official action.

The Association's attempt to limit the applicability of these remedial principles to cases in which there had previously been a statutory dual school system fails. In *Swann* and *Davis*, the Court clearly did not proceed on the assumption that the application of its remedial principles would operate only to eliminate the segregation which was directly attributable to illegal official action. The Court recognized that the segregation in those systems that remained after the school authorities abolished the statutory dual system and adopted a "neighborhood" school policy was, to some extent, a consequence of private residential patterns. *See Swann, supra,* at 25-26; *Davis, supra,* at 36. The Court clearly provided that, although all the remaining segregation in certain schools may not be attributable to illegal state action, the schools must be subjected to the maximum practicable desegregation. *Swann, supra,* at 21 and 28.

The lower federal courts have consistently rejected desegregation plans that attempted to justify the failure to desegregate certain schools on the ground that the racial composition of those schools results from housing patterns. Maximum feasible desegregation is required unless the school authorities can demonstrate that their actions in no way contributed to the segregated character of the individual schools. *See, e.g., Lee* v. *Macon County Board of Education*, 488 F.2d 746 (5th Cir. 1971); *Goss* v. *Board of Education of Knoxville*, 443 F.2d 632 (6th Cir. 1971); *Clark* v. *Board of Education of Little Rock*, 465 F.2d 1044 (8th Cir. 1972); *Brewer* v. *Board of Education of Norfolk*, 397 F.2d 37 (4th Cir. 1960).

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but the district court found that the School Committee had failed to satisfy this burden.[21] Hence, under *Swann*, the district court was obligated to fashion a remedy that would accomplish the greatest amount of system-wide desegregation taking into account the practicalities of the situation. *Swann, supra,* at 15-16; *Davis, supra,* at 37.

The Supreme Court has tacitly recognized the impotence of a remedy designed only to eliminate the demonstrable effects of past official conduct. While de jure segregation may not have been established at each and every school in a system, "common sense", to use the words of the Court, supports the conclusion that effects of the proven discriminatory actions pervade the school system as a whole. *Keyes, supra,* at 201. Acts that establish one school as white or as black will have a reciprocal effect on the racial composition of nearby schools. *Id.* at 202-03; *Swann, supra,* at 20-21. The use of various devices to earmark schools according to their racial compositions may well have had a "profound effect on the racial composition of the residential neighborhoods within the [city], thereby causing further racial concentra-

[21] The Association places extensive reliance on the language in *Swann* that provides that school authorities may, at the remedy stage, attempt to limit the geographic scope of the remedy by proving that the racial composition of the schools in certain areas in the system is in no way the result of present or past discriminatory action on their part. *Swann, supra,* at 26. *Swann*, however, cannot be read as supporting the proposition that causation is at issue during the remedial phase of a school segregation case when there has been a trial on liability. The burden this language describes is essentially identical to that which the presence of substantial intentional segregation shifts to the School Committee during the trial on liability. *See Keyes, supra,* at 203-05, and 210-11. In *Swann*, the school authorities were afforded the opportunity to satisfy this burden at the remedy stage of the proceedings because here had been no trial on liability. Here, of course, the school authorities have had their chance.

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tion within the schools." *Keyes, supra,* at 202. "People gravitate toward school facilities just as schools are located in response to the needs of the people." *Swann, supra,* at 20.[22]

From a practical point of view, the problems of determining what the racial composition of neighborhoods would have been, absent the unlawful discrimination, would be especially acute in such a case as this where the school authorities did not follow a genuine neighborhood school policy and where one form of discrimination was the locating of new schools and the overcrowding of existing facilities. 379 F. Supp. at 427-29, 469-74; *see Keyes, supra,* at 211-13. The task of unscrambling cause and effect would be, to understate it, awesome.

Even if we assume that the district court could reexamine each school to determine the shares of segregation attributable to public and private action, the application of the Association's theory would fail to vindicate the constitutional rights of many students presently enrolled in the Boston schools. It, of course, is the rights of the individual students that are in question. *Morgan* v. *Kerrigan,* 509 F.2d 599, 600 n. 3 (1st Cir. 1975); *see Brown* v. *Board of Education,* 347 U.S. 483, 494 (1954). Even if the court could reliably determine that 40 percent of a school's segregation was caused by official action and 60 percent by private residential patterns, it could not bifurcate an individual student. The result would in-

[22] For example, although a dominantly white school in a white neighborhood may appear to be wholly the result of the ethnic patterns of the neighborhood, when the School Committee has taken steps to incorporate the residential segregation into the schools, to earmark that school as a white school, and to permit white students from other parts of the city to attend it, that school has played a major role in skewing the racial profiles of the other schools in the system.

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evitably be that some victims of the School Committee's official policy would be forced to continue a segregated education.

Apart from the failure of the Association's theory to remedy the violations of individual rights per se, its adoption would seem to us to turn the process of desegregation on its head. Unconstitutional segregation is defined not only by percentages but also by community and administrative attitudes, *see Keyes, supra,* at 196, and by psychological effects, *see Brown, supra,* at 494. To require a district court to preserve intact every scrap of segregated education that somehow can be separated from governmental causation is to involve the federal courts in planning continued segregation and in perpetuating the community and administrative attitudes and psychological effects which desegregation should assuage. *Cf. Wright* v. *Council of City of Emporia,* 407 U.S. 451, 465-66 (1972).[23]

We add one further observation. The court had found that in the past the School Committee had given racially isolated black schools less support, particularly in the quality of faculties supplied, than other schools. The court had good reason to believe that if black and His-

[23] The Association places considerable reliance on *Milliken* v. *Bradley,* 418 U.S. 717 (1974), and, in particular, on its statement that "the remedy [in a school desegregation case] is necessarily designed, as are all remedies, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746. Although we understand why the Association believes this language supports its position, we read this language as entirely consistent with the continued application of the remedial principles of *Swann* and other such cases. As we have demonstrated, restoring the victims of unconstitutional segregation requires far more than eliminating the specific, demonstrable effects of the proven discriminatory acts. Restoration is necessarily a complex and widespread process.

panic students were not spread, visibly and bodily, in the mainstream among schools throughout the system, the racially identifiable schools in which they remained would continue to invite discriminatorily unequal treatment evading timely and effective remedy. A racially mixed population in each school would, on the other hand, be an insurance policy against any purposefully unequal allocation of resources. While the liability phase of this case primarily involved discriminatory separation, the realistic prospect of discriminatory inequality of support for schools which, though no longer subject to racial districting, transfer, or other such policies, remained predominantly black is a pragmatic factor further supporting the court's remedial order.

It is clear, therefore, that practical considerations as well as established principles mandated the rejection of the Association's remedial theory.[24] Hence, we hold that the district court did not err in refusing to modify its remedial guidelines.

It follows that the district court was correct in refusing to admit the Association's evidence on the causes of the existing segregation in the Boston schools. To the extent that the evidence was offered to establish the degree

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[24] The Association also contends that the Equal Educational Opportunities Act of 1974 required the district court to adopt its remedial theory. In particular, the Association points to § 213 of the Act, which provides that "in formulating a remedy for . . . a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct particular denials of . . . equal protection of the laws." 20 U.S.C. § 1712. This language, like the statement from *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974), discussed in note 23 *supra*, is entirely consistent with the continued application of the remedial principles of *Swann*, *Davis*, and *Green*. Because of the pervasive effects of the School Committee's actions, maximum practicable desegregation *is* "essential to correct [the] particular denials of equal protection [that occurred]." *See* note 23 *supra*.

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to which illegal state action had caused the racial segregation in the Boston schools, the evidence was legally irrelevant at this stage of the proceedings.[25] The only question before the district court was how to accomplish the greatest amount of actual desegregation consistent with the practicalities of the circumstances. To the extent that the evidence was offered to rebut the *Keyes* presumptions, it came too late and was barred by established principles of preclusion.[26] It is elementary that the district court was not required to reopen factual findings and legal conclusions reached after vigorous litigation — the whole point of which was to determine whether the segregation which concededly existed was caused by unconstitutional state action — and affirmed on appeal. *See, e.g., White* v. *Higgins,* 116 F.2d 312, 317-18 (1st Cir. 1940); *Bee Mach Co.* v. *Freeman,* 131 F.2d 190, 192-93

[25] At oral argument, the Association argued that the Tenth Circuit's recent decision on remand in *Keyes* v. *School District No. 1,* 521 F.2d 465 (10th Cir. 1975) (*Keyes II*), supports its contention that, even after a trial on liability, the district court is under an obligation to receive evidence on the discriminatory effects of the proven violations as part of its task in fashioning a remedy. *Keyes II* in no way supports this proposition. The evidence the district court admitted in *Keyes II* pertained to the question of liability, not to remedy. *Id.* at 471-73.

[26] The Association suggests that it should be permitted to attempt to rebut the *Keyes* presumptions now because the defendant School Committee was not afforded an opportunity to do so at the liability stage of proceedings since *Keyes* had not been decided at that time. We find this suggestion utterly without merit. The effect of *Keyes* was before the district court during the trial on liability, it having been decided on June 21, 1973, a time when that trial had been reopened. The School Committee did not seek a reopening on the issues presented by *Keyes;* it described *Keyes* as a restatement of the principles of the earlier Supreme Court decisions. In any event, the district court found that the record was sufficiently complete to apply *Keyes,* 379 F. Supp. at 479, and that finding was not challenged on appeal.

(1st Cir.), *aff'd*, 319 U.S. 448 (1943); *Hodgson* v. *Brookhaven Gen'l Hospital*, 470 F.2d 729 (5th Cir. 1972).

4. *The "White Flight" Controversy.*

The district court ruled that "white flight," defined as the departure of white children from the Boston city schools to parochial, private, or suburban school systems, is not a practicality for which the plan must make an accommodation. *Morgan* v. *Kerrigan*, 401 F. Supp. at 233-34. *See Davis, supra*, at 37. The Mayor and the Association challenge this ruling as an abuse of discretion, claiming that "white flight" alters the effectiveness of a desegregation plan and leads to "resegregation" of the schools.[27]

White flight is an expression of opposition by individuals in the community to desegregation of the school system. *Monroe, supra*; *Jackson* v. *Marvell School District No. 22*, 416 F.2d 380 (8th Cir. 1969); *Lee* v. *Macon County Board of Education*, 448 F.2d 746 (5th Cir. 1971). From the inception of school desegregation litigation, accommodation of opposition to desegregation by failing to implement a constitutionally necessary plan has been impermissible. *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*).[28]

Appellants contend, however, that white flight differs from other forms of opposition, because its effects, the withdrawal of white pupils from the school system, alter the effectiveness of the desegregation plan. The school system, they claim is "resegregated": the city school

[27] In the alternative, it is claimed that the district court should have taken white flight into account in modifying the masters' plan. *See* Part A 2, *supra*. The masters, however, rejected considerations of white flight in drafting their plan.

[28] "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300.

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system largely black and other minority; the private and suburban systems, largely white.[29] To prevent this re-

[29] Subsequent to the district court decision, we allowed to be filed, subject to a determination of relevance, voluminous affidavits and other materials by social scientists on the subject of white flight.

The admissibility of these submissions have been attacked as being outside the record, F.R.A.P. 10(a), and as hearsay. The materials have been defended as sociological data in the nature of "legislative facts" relevant to a determination of the law governing the district court in this matter.

For reasons we discuss in the text, we reject all these materials as irrelevant to the issues before us on this appeal. We include a brief synopsis of these materials to illustrate the difficulty in evaluating white flight if it were relevant.

The data submitted initially by the Association consists of an affidavit and report prepared by James S. Coleman, Professor of Sociology at the University of Chicago. Dr. Coleman states that his recent study shows that while there is decreasing segregation within school districts, segregation between school districts in the same metropolitan area is increasing; that rapid increase in loss of white children from central city schools follows immediately after school desegregation; and that as a consequence, desegregation has not significantly raised the levels of academic achievement of blacks.

Plaintiffs counter with the transcript of testimony given by Jane R. Mercer, Associate Professor of Sociology, University of California at Riverside, in a case involving Indianapolis. Her testimony shows that she studied desegregation in school districts throughout the state of California; that white exit to private schools is a short term phenomenon; and that declines in white population in the cities are part of a long term demographic trend independent of desegregation. The plaintiffs also submit a paper written by Meyer Weinberg, Editor of *Integrated Education* magazine, which summarizes other studies showing white flight to be an avoidable phenomenon, not an inevitable consequence of mandatory desegregation. Weinberg's paper and another paper written by Professors Green of Michigan State University and Pettigrew of Harvard University, criticize Dr. Coleman's methodology, claiming that the source of his raw data is unknown; that failure to evaluate large cities which have been subject to massive desegregation orders separately from large cities which have not been subject to court orders undermines the

study's relevancy; and that failure to control for other variables, which may be correlated with white flight, jeopardizes the validity of his conclusions.

Dr. Coleman replies in an affidavit filed with a copy of a working paper, "Trends in School Segregation, 1968-73", In his affidavit, Dr. Coleman states that the report previously filed with the court was prepared for oral delivery and was based on the attached working paper. He defends his methology, states that his conclusions are consistent with the findings of the studies cited by Weinberg, and the studies conducted by Dr. Mercer. Dr. Coleman states that his study shows that massive white flight will occur when there is a significant decrease in segregation in a city where there is a high proportion of blacks in the central city and suburbs of a significantly different racial composition.

Plaintiffs, in rebuttal, file another study prepared by Christine H. Rossell, of Boston University. The Rossell study, prepared from data on 86 northern school districts subject to court ordered or legislatively enacted school desegregation, suggests that white flight is minimal and a temporary reaction to school desegregation. Plaintiffs claim that Dr. Rossell's study differs from Dr. Coleman's in that Dr. Rossell deals only with northern school districts subject to desegregation plans while Dr. Coleman does not distinguish between forms of desegregation.

In the final submission, Dr. Coleman defends his study against the Rossell findings, suggesting that her analysis is inadequate to examine the effects of desegregation on a core city school system. He further claims that his model has proved accurately predictive of the Boston experience.

Throughout this series of submissions this court has been burdened with reports written for sociologists by sociologists utilizing sophisticated statistical and mathematical techniques. We lack the expertise to evaluate these studies on their merits. We do come to one conclusion, however. The relationship between white flight and court ordered desegregation is a matter of heated debate among experts in sociology, and a firm professional consensus has not yet emerged.

Appellants have also filed with this court copies of the Boston School Department's current census of students according to race and minority group. The figures facially suggest loss of a significant number of white enrollees. We note, however, that the district court is currently studying the accuracy of past enrollment data. We decline to make any conclusions concerning the existence or nonexistence of white flight on the sparse figures available to us.

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sult, appellants claim that the district court should consider white flight a "practicality", and limit the amount of desegregation to that level which would enjoy acceptance in the white community.[30]

There are two endemic flaws in this argument. First, in the trial on liability, evidence was presented that feeder patterns, district lines, and open transfer policies were established for the purpose of satisfying purported white community desires. 379 F. Supp. at 438, 449. This evidence resulted in a finding that the Boston schools were administered in violation of the Fourteenth Amendment. Appellants now ask that the district court, in devising a remedy for these violations, respond in the same way

[30] Appellants suggested approach would necessarily involve the district court in something like the following analysis: (1) take evidence concerning the prospects of white flight under the various plans proposed; (2) exclude the causes of such flight attributable to any historic trend, or such factors as overcrowding, transportation difficulties, deteriorated housing, taxes, crime, pollution, industrial migration, etc.; (3) make a judgment as to the effect which different levels of desegregation would have on white flight; and (4) select or devise that plan which will incorporate enough desegregation to bring about the maximum amount of inter-racial contact in the schools after taking account of the white flight such desegregation would be expected to induce.

The experts have difficulty in attempting to justify conclusions as to the effect of past desegregation plans on white flight, *see* note 29 *supra*; the task of making estimates of expected exodus of whites attributable to varying future desegregation plans would seem to be more difficult. Conceivably, public attitude sampling could be undertaken, using various hypotheses. This might involve questioning parents in a particular section or school district whether they would be likely to place their child elsewhere, or move, if the child were to attend a school which was x, y, or z percent black. The possibility is a real one that surveys would indicate that the prospect of any substantial amount of desegregation or busing would provoke sufficient expressions of intent to flee as to negate any desegregation plan. Alternatively, if expressed intentions were to be heavily discounted, their utility would accordingly diminish.

as the Boston School Committee did to the same perceived community attitudes: draw district lines, assign pupils to schools, and limit racial mixture to reduce "white flight". In other words, while appellants dwell upon the unpleasant prospect of an inner city black school system surrounded by suburban white school systems, the prospect contemplated by their approach is that of an inner city segregated system, created unlawfully, but permitted to endure because the apprehension of massive white flight has made legal what had once been in violation of the constitution.

Second, appellants' claim that white flight destroys the effectiveness of the school desegregation plan, because of "resegregation" of the school system, founders on the constitutional definition of unlawful segregation. The Supreme Court has recently reemphasized that the constitutional right is to attend school in a unitary, non-discriminatory, public school system. It is not to attend school in a system which is comprised of students of a racial balance which exists in the general geographical area. *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). *Accord Calhoun* v. *Cook*, No. 74-2784, slip op. at 396 (5th Cir. Oct. 23, 1975); *Mapp* v. *Board of Education of Chattanooga*, Nos. 74-2100-01, slip op. at 3-6 (6th Cir. Oct. 20, 1975). What the layman calls "resegregation" is not constitutionally recognized segregation. It is racial isolation imposed by historic school district boundaries, *Milliken* v. *Bradley*, *supra*, or by individual choices to attend private institutions. *Compare McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir.), *cert. granted*, 44 U.S.L.W. 3279 (1975). This racial isolation becomes constitutionally significant only when the district boundaries are drawn with segregative intent, *Evans* v. *Buchanan*, 393 F. Supp. 428, 445-46 (D.C. Del.) *aff'd*, 44 U.S.L.W. 3295 (1975); *United States* v. *Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*,

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44 U.S.L.W. 3272 (1975); *see United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972), or when the state participates in the private institutions. *Norwood* v. *Harrison*, 413 U.S. 455, 463-65 (1973).

The constitution cannot solve all problems. On the contrary, to the extent that it demands that rights which have previously been overriden be enforced, it creates social problems. It inconveniences, sometimes substantially, law enforcement officers, prison wardens, university administrators, and government bureaucrats. And, when it allows tasteless books to be sold or movies shown, many are offended. But expectable individual, official or group reaction does not outweigh constitutional rights. We therefore must agree with another court which said, "concern over 'white flight' . . . cannot become the higher value at the expense of rendering equal protection of the laws the lower value." *Mapp* v. *Board of Education of Chattanooga, supra, quoting* 366 F. Supp. 1257, 1260 (E.D. Tenn. 1973).

The bright note in this otherwise somber picture is the care and imagination that the district court has displayed in structuring a diversified educational system offering superior opportunities for children, both white and black. The plan is not a mechanical device to ensure that the races share equally, but serves its constitutional goals within a framework offering educational hope for the children of the city. Nevertheless, federal courts have a limited jurisdiction and competence. To the extent that reorienting the Boston school system involves social expenses, it must be paid for in coin less dear than the constitutional rights of the city's citizens. Here as elsewhere, the Boston community must look to other institutions, city, state, federal and private, to contribute to an effort to vindicate the constitutional rights of its citizens at a minimum of social cost.

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B. *Detailed Challenges to the Court's Plan.*

The issues we have discussed above address the constitutional and statutory limitations on the court's power to issue a plan at variance with the Committee's or the masters' plan (Parts A 1 and 2) and to refuse, in tailoring its plan to consider evidence of the precise impact of prior official segregative actions and of the extent to which its plan might cause the departure of white students from the school system (Parts A 3 and 4). We now consider a range of more specific objections to particular features of the plan and its method of implementation.

1. *Ratios and the Examination Schools.*

Appellants School Committee, Mayor and Association challenge the district court's use of racial percentages and quotas in several contexts: the guidelines for the composition of the schools in community school districts, the guidelines for the composition of citywide magnet schools, and the minimum percentage of black and Hispanic students mandated to be admitted to the elite, examination schools. Appellants claim that the district court's use of percentages was in violation of the Supreme Court's disapproval of fixed racial quotas in *Swann, supra.* We find that the district court resorted to percentages in an appropriate manner throughout.

The district court first ordered the overall racial composition to be used as a starting point in designing a school desegregation plan. This approach is specifically approved in *Swann.* In devising the court plan, community school districts were drawn to provide for a rough equality of racial composition among the districts to be desegregated.[31] Within each community school district,

[31] Rough equality between districts was desirable to allow students from all the districts equal access to the citywide magnet schools without adversely affecting desegregation of the districts.

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the court ordered that students should be assigned to particular schools so that each school's population approximates the composition of the community district. A deviation margin of ± 25 percent of the racial percentage figures was allowed to provide flexibility in planning. The desegregated schools in Boston, therefore, range between 30-70 percent white and 30-70 percent black and other minority under the plan.[32] This use of statistical ranges is consistent with other desegregation cases, *United States* v. *School District of Omaha*, slip op. 35-37 (8th Cir. June 12, 1975) (citywide school racial composition, 80% W-20% B; schools to be 0-35% B, 65-100% W); *Yarborough* v. *Hulbert-West Memphis School District No. 4*, 457 F.2d 333 (8th Cir. 1972) (citywide elementary schools 47% W-53% B; schools to be 30-70% W, 30-70 B), and does not establish racial quotas in contravention of *Swann*.

A more significant challenge is made to the guidelines for the composition of the citywide magnet schools. Each school is to limit its enrollment to fall within 5 percent-

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The district court divided the school system into eight community districts and a ninth citywide district. The overall racial composition of the system for the 1975-76 school year was projected at 51% white (W), 49% black and other minority (B&OM). The projected enrollments in the seven community districts which would be desegregated ranged in racial composition from 61% W — 39% B&OM to 40% W — 60% B&OM. The eighth district, East Boston, was left predominantly white because of its isolated geographic location.

[32] In district 4, with a projected racial composition of 61% W — 39% B&OM, the permitted variance of the composition of the schools is 70% W — 30% B&OM; 50% W —50% B&OM. Because the percentage of black and other minority students cannot fall below 30% (39% — 25% (39) = 30%), the percentage of white students cannot rise above 70%. The same observation, in reverse, pertains to district 7, which is 40% W — 60% B&OM.

age points of the citywide racial composition.[33] The district court found that a narrow range of enrollment ratios was permissible for schools in the citywide district because the practicalities to be accommodated, primarily geographic elsewhere in the system, were significantly smaller in the citywide district schools.

There are, moreover, substantial positive reasons for enforcing a narrow range of permissible enrollments. The magnet schools were designed to maximize voluntary desegregation. Significant departures from the overall racial composition could cause the magnet schools to hinder rather than help the process of desegregation. First, attendance at the schools is voluntary. Few individual students will choose to attend a school which is predominantly of the other race. Second, the students attending the magnet schools come from the community school districts. If disproportionate numbers of one race transfer to the citywide school district, the racial composition of the community districts suffer. Fundamentally, the magnet schools, in order to prove of value to the desegregation plan, had to be carefully circumscribed to ensure that they would not serve as a haven for those seeking to attend a school predominantly composed of those of their own race.

Finally, appellants challenge the district court's order that at least 35 percent of the incoming class at the elite, examination schools be black or Hispanic as a racial quota. At face value, this directive does appear to establish a fixed racial balance for those classes at Boston Latin School, Boston Latin Academy, and Technical High School. But, once the schools are viewed as magnet

[33] Since citywide project composition was 51% W — 49% B&OM, magnet schools could permissibly enroll 56-46% W, 44-45% B&OM. The bilingual, bi-cultural magnet, Hernandez, was excepted from this requirement.

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schools, and as part of the citywide school district, the objection disappears. True, these schools are treated differently from the other magnet schools in that only the entering classes are desegregated, rather than the entire student body. This is to accommodate the cumulative nature of the instruction offered at these schools. For the entering classes, however, the district court's order provides that the racial composition shall be similar to that of the other magnet schools: at least 41% black and other minority.[34] It is, therefore, no more an impermissible racial quota than are the guidelines established for magnet schools generally.

There are, however, other, more fundamental challenges to the district court's treatment of the examination schools. The Association protests the schools' inclusion in the remedial plan since no specific segregative acts were proven in their administration. It also claims that a racial preference for admission is unconstitutional discrimination on the basis of race. The Mayor challenges the rejection of several alternative plans for the desegregation of the examination schools which would have imposed specific admissions criteria.

We start with the proposition that it is not unconstitutional per se for a city school system to operate an elite school even though low income or minority children may be under-represented in the student body, *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264,

[34] The entering classes normally enroll 6-8% Asian-Americans. When these numbers are added to the black and Hispanic students, the percentage of the entering class which is characterized as black and other minority is in the range of 41-43%. As school officials testified that it would be difficult to find sufficient black and Hispanic students to satisfy the minimum figures, the district court apparently did not consider it necessary to place an upper limit on minority enrollment.

1267 (9th Cir. 1974). The examination schools in Boston, however, are an integral part of a school system which has been found to be administered in an unconstitutional manner. They are presumed to be unlawfully segregated. *Keyes, supra.* As such, the examination schools must be part of the remedial plan. *See* Part A 3, *supra.*[35]

Several other plans for desegregation of the examination schools were presented to the district court. All relied on the Secondary School Admission Test (SSAT) to establish admissions criteria.[36] The district court found that the SSAT, although apparently of some predictive accuracy, had not been validated as a means of identifying students who can benefit from the examination schools' curricula. *Cf. Castro* v. *Beecher*, 459 F.2d 725, 732, 735-36 (1st Cir. 1972). Because of the limited amount of sta-

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[35] This fact also disposes of the Association claim that imposing a racial preference at the examination schools is unconstitutional for those reasons expressed in Justice Douglas' dissent in *DeFunis* v. *Odegaard*, 416 U.S. 312, 320 (1974). Whatever the constitutionality of racial preferences in the absence of past unlawful discrimination, they are a basic tool in remedying constitutional violations. *See Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972).

[36] The old method of selecting admittees to the schools was mandated by a consent decree between the School Committee and the Massachusetts Commission Against Discrimination (MCAD). This decree introduced the SSAT and admission was based solely on the scores of that test. As the plaintiffs were not parties to the MCAD litigation, the district court was not bound by the consent decree.

An alternative plan, proposed by the alumni associations of the affected schools, would have had 65% of admission based on the SSAT scores alone, the remaining 35% to be chosen in racial proportions but setting a score in the 50th percentile on the SSAT as a floor for admissions.

The masters' plan allowed for grade point averages as well as SSAT scores to be used, but adopted the use of a SSAT score floor.

tistical data available, moreover, there was no assurance that any of these plans would admit a significant number of minority students. Given these factors, we find that the court acted within its discretion in rejecting the alternative plans.

The appellants claim that the district court's order will destroy the examination schools as elite academic institutions. If the order were inflexibly to require, for some years to come, the admission of blacks and Hispanics despite demonstrable underqualification by validated selection processes, we would hesitate to affirm. But the order is a temporary expedient, designed to ensure that the examination schools participate in the desegregation of Boston schools, pending development of racially neutral admissions criteria and the desegregation of the elementary schools. Advanced work classes at the elementary level which successfully feed students into the examination schools are being desegregated. Therefore, there is promise that more minority students will become eligible for admission to the examination schools under any admissions standard.[37] The parties have been specifically invited by the court to develop admissions criteria which can be shown to identify accurately students who can benefit from the examination schools' programs 401 F. Supp. at 244. *See Smuck* v. *Hobson*, 408 F.2d 175, 187-90 (D.C. Cir. 1969). We are convinced that the district court will monitor the progress of desegregation in the examination schools and will adjust its future orders to ensure the continued vitality of these schools as elite institutions. For the present, however, we affirm the court's treatment of the schools as within its discretion.

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[37] Appellants claim that only 25% of admittees come from advanced work classes. While it is obvious that the examination schools cannot be completely desegregated by the advanced work classes, desegregation of the classes is a positive step.

2. *Challenges to Composition of Masters' Panel Expert Dentler and to the Masters' Compensation.*

After the various desegregation plans had been submitted, the district court appointed two experts to assist it in evaluating the plans and also appointed a panel of four masters to consider the desegregation plans, hold evidentiary hearings, report to the court and recommend a desegregation plan. It also directed the city defendants; the School Committee, and the Superintendent of Schools, to pay the masters compensation of $200 per diem plus expenses. The School Committee objected to the appointment of three of the masters — Francis Keppel, Charles Willie, and Edward McCormack — and of one of the experts — Robert Dentler — on the grounds that their associations with the plaintiffs rendered them unqualified to serve.[38] These objections were overruled, and the masters and experts performed their assigned tasks. On May 2, 1975, the district court ordered the city defendants to pay the masters compensation of $21,906.13. The School Committee objected,[39] but its objection was overruled. The School Committee appeals the district court's rulings on the qualifications of the masters and expert and on the masters' compensation.

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[38] The district court rested its decision on the qualifications of Master McCormack and Expert Dentler on the alternative ground that the School Committee's objections were not timely filed. The objection to the qualifications of these individuals took the form of a motion to expunge filed on March 4, 1975, more than a week after the masters' hearings concluded and almost a month after the February 6 deadline for filing objections. Since we hold that the district court did not err in its ruling on the merits, we need not reach this point.

[39] We need not express an opinion on the timeliness of this objection in the light of our holding on the merits.

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There is no merit to the School Committee's contention that the district court's failure to disqualify the masters and expert constituted reversible error. We observe, preliminarily, that the chance of error, if any, inflicting prejudice was remote. We have held that the masters' and district court's rejection of the School Committee's desegregation plan was constitutionally required. The masters' plan, while relied upon by the district court, was itself strengthened by the district court and thereby made less acceptable to the School Committee. Moreover, the impartiality of the masters is suggested by their criticism and rejection of the plaintiff's plan. Thus, any error would seem to us to have been rendered harmless. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 148 (4th Cir. 1970), *rev'd on other grounds*, 402 U.S. 1 (1971). We need not rest our decision on this basis since we agree that there were no grounds for disqualifying any of the masters or experts.

The basis for the School Committee's objections to Masters Keppel and Willie is that they have been associated with the Harvard University Graduate School of Education and thus are indirectly related to the Harvard Center for Law and Education, three of whose staff attorneys have helped represent the plaintiffs in this case. The ground for the objection to Master McCormack and Expert Dentler is that they have supported the NAACP which, although not a party, supports the plaintiffs' suit, has advanced funds to cover disbursements, and has permitted its General Counsel to serve as one of plaintiffs' counsel. The relationships of these individuals to the plaintiffs' counsel are attenuated. Master Keppel was Dean of the Graduate School of Education until 1962 and Master Willie has been a member of the faculty there

since 1974.[40] The Harvard Center for Law and Education, which was founded in 1969, is completely independent of the Graduate School of Education. Although it is housed in the Graduate School, it is funded by the federal government and pays the Graduate School for space and services. We fail to see how a relationship with the Graduate School could give rise to a reasonable inference of possible bias in favor of the plaintiffs with respect to the scope of the desegregation remedy in this case. We reach a similar conclusion with respect to the other master and expert. Expert Dentler has been a member of the NAACP in the past, but could not remember whether he paid his dues for 1975. Master McCormack became a life member in 1960. Although these relationships suggest general agreement with the goals of the NAACP, they hardly provide a reasonable basis for concluding that these individuals would be biased in the plaintiffs' favor with respect to the breadth of the desegregation remedy. We note, moreover, that several of these individuals have relationships with the School Committee which might, to an equal extent, suggest bias in the School Committee's favor.[41]

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[40] On appeal, the School Committee suggests that it was improper for the district court, in considering the School Committee's objections, to rely upon interviews with Masters Keppel and Willie and upon representations of plaintiffs' counsel. It is clear from the record, however, that the School Committee acquiesced in this method of investigation.

[41] The Harvard Graduate School of Education has, on several occasions, been hired by the School Committee to conduct surveys. Expert Dentler, in his capacity of Dean of Boston University's School of Education has done work for the Committee. Thus, three of the four individuals challenged have benefitted financially from their relationships with the School Committee.

Since masters and experts are subject to the control of the court and since there is a need to hire individuals with expertise in particular subject matters, masters and experts have not been held to the strict standards of impartiality that are applied to judges. *See United States* v. *Certain Parcels of Land,* 384 F.2d 677, 681 (4th Cir. 1967); *Scott* v. *Spangler Bros., Inc.,* 298 F.2d 928, 931 (2d Cir. 1962). *Cf.* 28 U.S.C. §§ 144, 455. Here, we doubt that, even under the strict standards applied to judges, the district court erred. Motions to disqualify judges have frequently been denied even in cases far stronger than this case. *See, e.g., McNeil Bros. Co.* v. *Cohen,* 264 F.2d 186, 188-89 (1st Cir. 1959); *Eisler* v. *United States,* 170 F.2d 273, 278 (D.C. Cir. 1948); *Darlington* v. *Studebaker-Packard Corp.,* 261 F.2d 903, 906 (7th Cir. 1959); *Weiss* v. *Hunna,* 312 F.2d 711, 714 (2d Cir. 1963). We conclude that these individuals were qualified under the more relaxed standards that are applied to masters and experts.

The School Committee's challenge to the order that it pay the masters' compensation is also without merit. The district court has broad discretion in fixing the amount of such compensation and in determining which of the parties to charge. F.R.Civ.P. 53(a). Here there is no basis for concluding that the district court abused its discretion. The grounds for the School Committee's objection is its belief that the reference to the masters was unnecessary and unwise and that the masters expended a great deal of time and energy fruitlessly. Assuming arguendo that these allegations would constitute grounds for setting aside the district court's order, we note that the district court reasonably reached contrary conclusions regarding the necessity and utility of the masters' work. We hold that there was no abuse of discretion.

3. *Alleged Encroachment on School Committee Functions.*

To effectuate its plan in this case, the district court adopted what it called a "multiplicity of measures" beyond the mechanical redistribution of students. The broad purpose of these measures, as articulated in the opinion below, was effective implementation of equal educational opportunity through banning active discrimination, meeting the persisting effects of past discrimination, and alleviating the difficulties of transition to a desegregated situation. The School Committee concedes these are proper goals, but objects to some specific measures as encroachments on its traditional powers and functions. Although we discuss the challenged provisions individually below, the greatest justification of each, in our view, is common to all.

The overriding fact of the matter is that the district court in this case has had to deal with an intransigent and obstructionist School Committee majority. These elected officials engaged in a pattern of resistance, defiance and delay. *See generally* Part II of the opinion below; on previous Committee resistance to state desegregative efforts, *see* 379 F. Supp., at 418-21, 429-32, 438-41, 451-56, and 477. The most visible recent example of such conduct was their refusal to authorize submission to the court of the desegregation plan drawn up by the Committee staff, an action which provided the basis for subsequent contempt convictions; upon the rather lenient purging of those convictions, they then submitted a freedom of choice plan which they knew was inadequate. And they did not hesitate to manifest directly to the court their *unwillingness* to cooperate with the effort to desegregate the Boston schools. The court addressed interrogatories to the Committee members late in December,

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1974, relative to their willingness to promote the peaceful implementation of the Phase I interim plan in effect during 1974-75. The then Chairman responded: "I will continue to obey lawful orders of the Court, but I will take no initiative or affirmative action to advocate or supplement this plan . . . ." Similar responses were made with respect to the future promulgation of a court-developed plan. In short, the obstruction by the School Committee was substantial and the district court had every reason to believe it would continue. This crucial fact justifies, in our opinion, a number of extraordinary measures which might otherwise be open to question.

a. *Specifying magnet programs.*

The School Committee does not object to the concept of magnet schools; indeed, Boston has had a number of such schools for many years. The Committee's plan retained these, and proposed a total of about 50 magnet programs, more than twice as many as the court's plan provided for.[42] The narrow objection under this heading is to the court's specification of the particular programs to be developed at several of those schools.[43]

The magnet schools play a central part in the court's desegregation scheme. The citywide school district contains an unusually high number of these facilities meant to attract students from all over the city to specific distinctive programs that appeal to them. If successful, this desegregative tool will stimulate substantial volun-

[42] The experts and masters felt this number would so saturate the city as to deny the magnet schools a desegregative effect, their raison d'etre. *See* note 10, *supra*.

[43] The court's plan left intact the programs of those citywide schools which had established themselves over the years as magnets, and it apparently adopted a number of the magnet programs as proposed in the Committee plan. The Committee's appeal is addressed only to five or six instances where it is felt that the court's plan is inconsistent with its own proposals.

tary student transportation, reducing forced busing; and 20 U.S.C. § 1713(f) required the court to look to magnet schools before resorting to mandatory transportation beyond the next nearest school. Implicit in the power to use magnet schools, at least upon the default of the School Committee, is the power to specify programs essential to make them magnetic. In this case, that power was more crucial because of the importance of the magnet schools to the plan being implemented.

We do not find in the record below any School Committee objection to the court's power to order programs, or to the specific programs required. Nor do we see any indication that the district court would be unreceptive to any equally attractive programs which the School Committee might desire to substitute for those provided for in the court's plan. Good faith cooperation by the Committee would appear to be all that is required.

b. *The contracts with colleges and universities.*

As part of its effort to provide magnet programs that would be distinctive and attractive enough to work, and more generally to equalize educational opportunity, the court enlisted the aid of a number of area colleges and universities, each to participate in the development of programs at specific schools. The court ordered the school department to "use its best efforts to negotiate a contract pertaining to each paired school acceptable to both the School Committee, and the contracting institution of higher learning." 401 F. Supp. at 247. The court refrained from specifying any of the op. at 84. The court refrained from specifying any of the terms of these contracts, except to note that the institutions should not "usurp or replace the proper role of the School Department or any of its employees . . . ." The state defend-

ants, which have advanced $900,000 and are likely to absorb much of the future cost of his project, *see* Mass. G.L. c. 71, § 371; c. 15, § 11, and 401 F. Supp. at 246, and the Boston Teachers Union support this aspect of the court's order; but the School Committee charges that it enters the area of quality of education, and is thereby outside the court's authority.

"In default by the school authorities of their obligation to proffer acceptable remedies, a district court has a broad power to fashion a remedy that will assure a unitary school system." *Swann, supra,* 402 U.S. at 16. The magnet schools were a central part of the court's remedy, but to accomplish their purpose they had to be both well conceived and implemented in good faith. The School Committee takes out of context remarks of the court that assistance of the colleges would improve the quality of education in the system and "wonders how the issue of quality of education arose". This argument — that the court has no legitimate function to improve quality — entirely misses the point that if magnet schools are to act as lodestones, drawing students voluntarily to their programs, quality is a key to this aspect of a plan of desegregation. And the court had been led in the clearest terms to understand that the Committee would do only what it was ordered to do. Reliance on the Committee to create imaginative programs of utility and attractiveness would not only have been ill advised, but the supervision of compliance in this area, as opposed to student assignment for example, would have been extraordinarily complex and might well have drawn the court into purely educational decisions. Paradoxically, therefore, the resort to outside contracting may have an effect precisely the opposite to that alleged by the appellants. In ordering the contract talks, the court removed itself from the

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content of educational decisions as much as possible by mandating best efforts negotiation rather than any specific provisions. In the context of this case, that order amounted to the most reliable and least intrusive method of ensuring that the School Committee would act to implement the magnet school provisions, which in turn were important to make the remedial plan work.

This provision of the order, being innovative, is without precise precedent in other cases. But in light of the background of the case and the particular objective being served, we hold the best efforts provisions to be within the equitable discretion of the court.

c. *The citywide and community councils.*

The Citywide Coordinating Council and Community District Advisory Councils were established to monitor implementation on behalf of the court. The CCC was also charged with trying to identify and resolve problems, but was explicitly not authorized to "co-manage or make policies for the Boston schools."[44] Citizen participation in the desegregation process was embodied in the Community District Advisory Councils, drawn largely from the unobjected-to racial-ethnic parents' and students' councils established the previous year. Such groups have been approved in many cases, *e.g.*, *Dowell* v. *Board of Education*, 465 F.2d 1012, 1015-16 (10th Cir. 1972); *Singleton* v. *Jackson Municipal Separate School District*, 426 F.2d 1364, 1370 (5th Cir. 1970).

The challenge to these provisions asserts that they involve more than mere monitoring. The Committee objects that the CCC's duties of attempting to resolve problems and of offering advice to the school department infringe on the Commtitee's power to have general

[44] The city defendants, charged with paying the costs, have not objected to these councils.

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charge of the schools. As we view the mandate, however, no substantive power was accorded to the CCC and CDACs. Apart from the invaluable function of clustering groups of different generations and races in an attempt to promote citizenship understanding and support, the monitoring process is a basic responsibility of the court. To the extent that the myriad of minor problems which will arise can be resolved without the necessity of resorting to the district judge, the process of implementation will be facilitated.

The Committee objects that the CCC was instructed "to support efforts to improve the quality of education." Attention to educational programs from the perspectives of banning active discrimination, assuring equal educational opportunity, meeting the effects of past discrimination, and alleviating the transition to desegregation is obviously a proper goal needing no justification. While better quality education as a general goal is beyond the proper concern of a desegregation court, we do not view the court's instructions to be divorced from its efforts to devise an effective plan of desegregation.

d. *Additional supervisory personnel.*

Since the court's plan established three more districts than had previously existed, it required three more district superintendents to be hired. This requirement is contested, but not vigorously. The more major objection is to the court's order that each elementary school be headed by an administrator of the rank of headmaster or principal.

If these provisions were reasonable, both were within the power of the district court. The equalization of educational opportunity through the implementation of the desegregation remedy at the schools requires effective administration. Similar orders have been upheld rou-

timely. *See Davis* v. *School District of City of Pontiac*, 487 F.2d 890 (6th Cir. 1973); *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817, 821 n.2 (5th Cir. 1969). But the Committee (joined in this point by the Mayor), argues that the order as to elementary school administration was arbitrary and unreasonable, and therefore an abuse of discretion. The elementary schools previously were joined in multi-school districts headed by district principals. With the dissolution of these multi-school units, a number of which the district court had found to be segregated within themselves, 379 F. Supp. at 437, over 100 elementary schools exist under the court's plan, including six with a capacity between 100 and 180 students. The School Committee charges that the court's order would require 80 new principals; the Mayor, perhaps partly because he concedes the need for principals in each elementary school housing more than 1,000 pupils, places the figure at 53.

This argument is not addressed to the proposition that each school should be under the supervisory responsibility of one person but to the implication of the court's order, which refers to "rank of principal or headmaster", that the smallest of schools shall be headed by a person commanding the same grade level and pay as a person who supervises the largest. Subsequent to the court's order, we are informed, the court stated that its intent was simply that there be a "person in charge" of each facility; the level of compensation was left to the School Department and Committee. This seems to us the sensible approach. The district court having clarified the meaning of its order, we see no reason at this juncture to set it aside, but leave the matter to be worked out by the school authorities to the satisfaction of the district court.

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e. *The power given to the experts.*

The Committee objects to three orders of the court with respect to its experts.

The May 10 order promulgating the court-developed desegregation plan provided that the assignment of students be carried out "under the supervision of representatives of the court". The memorandum of decision on June 5 stated: "The nature of instruction given in the schools must also receive the attention of the court and its representatives. Instruction must be non-discriminatory and avoid racial stereotyping." 401 F. Supp. at 234. We see nothing unusual in these orders. Experts are commonly used to assist the court in planning desegregation, *see generally Hart* v. *Community School Board of Brooklyn*, 383 F. Supp. 699, 764-67 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975), and under the circumstances of this case were justifiably used to assure implementation as well. It is regrettable that there was a need to closely monitor the assignment process, but it is the Committee's own doing. To have neglected it, or to have failed to assure that instruction was non-discriminatory would have been irresponsible of the court.

The June 20 order was a response to a delayed School Committee proposal about certain of the guidelines which needed to be settled before the student assignment process could begin. The proposal conflicted substantively with the court's previous orders in several respects, and advanced positions which (also contrary to court orders) had not been discussed with the court's experts. Operating under serious time pressure to effectuate the desegregation plan smoothly for the fall, the court "authorized the court-appointed experts to resolve forthwith the remaining issues with respect to facilities utilization, program allocation and enrollment units. The court will

as soon as feasible review with the court-appointed experts their determination of these remaining issues . . . ." While this order perhaps gave the experts an unusual, if brief, amount of power, it was justified by the School Committee's actual violations of the court's substantive and procedural orders, and its unwarranted delay in the face of the urgent necessity of finalizing these decisions. The court specifically found that absent this order "the student assignment process would be stalled and the implementation of the May 10 plan be jeopardized." Along with the provisions for immediate court review, this order was proper under the circumstances.

Moreover, all of the duties specifically provided for in these three orders having now been substantially performed, the only active controversy remaining under this heading probably is the continued existence of the experts themselves. The Committee urges that their function is completed, and that they "should now return to their university." We agree that this will be appropriate once a unitary school system has been established, and perhaps even earlier in the court's discretion. The speed with which this goal is accomplished, however, rests in large measure in the hands of the Committee itself. We note that a new Committee was elected in November; it is our hope that the new majority will be more constructive than the old. If so, the court measures discussed in this section, many of them undoubtedly aggravating, may cease to be necessary.

* * * *

We therefore affirm the District Court's plan and implementation order for Phase II.

Appendix B.

Relevant Provisions of the Equal Educational Opportunities Act of 1974 (20 U.S.C. §§ 1701 Et. Seq.).

SUBCHAPTER I — EQUAL EDUCATIONAL OPPORTUNITIES

PART ONE — POLICY AND PURPOSE

§ 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that —

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

§ 1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments

(a) The Congress finds that —

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize

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their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

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PART 4 — REMEDIES

§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

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(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

§ 1714. Transportation of students — Limitation to school closest or next closest to place of students' residence

(a) No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

Health risks; impingement on educational process

(b) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

School population changes resulting from population changes

(c) When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter

residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring.

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

§ 1754. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States

The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether

the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

§ 1755. Additional priority of remedies after finding of de jure segregation

Notwithstanding any other provision of law, after June 30, 1974 no court of the United States shall order the implementation of any plan to remedy a finding of de jure segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate.

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Supreme Court, U. S.
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MAY 13 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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BOSTON HOME AND SCHOOL ASSOCIATION,
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v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

Tallulah Morgan, et al., black parents and their children attending the Boston public schools, oppose the Boston Home and School Association's petition for certiorari. Respondents Morgan, et al. are also authorized to represent that plaintiff-intervenors El Comite de Padres Pro Defensa de la Educacion Bilingue, which represents Hispanic school children and their parents, oppose a grant of certiorari for the reasons set forth in this Brief and in the Briefs in opposition to the Petitions in Nos. 75-1441 and 75-1446.

Opinions Below

The opinion of the United States District Court for the District of Massachusetts, from whose affirmance in the Court of Appeals review here is sought, is not reproduced in the Petition. The petition correctly states that the opinion is reported at 401 F. Supp. 216; that report contains omissions noted at 401 F. Supp. at 252, 256, 260, 261, 270. The complete opinion is reproduced in the Appendix to the Petition of John J. McDonough, et al., No. 75-1445, pp. 57-207, and will be cited as "No. 75-1445, A." The Court of Appeals' opinion is reproduced in the petition, and will be cited as "A-".

Statement of the Case

Some important facts are needed to supplement the Petitioner's presentation.

1. The Petition's claim (pp. 5-6, 15-16) that the District Court's findings of system-wide segregation in the Boston public schools at the liability phase of this action were "unanticipated" and deprived the defendants of the opportunity to respond to *Keyes* v. *School Dist. No. 1, Denver,* 413 U.S. 189 (1973), was rejected below by the District Court (A-4; transcript, 2/5/75, pp. 65-70) and the Court of Appeals (A-32 n. 26). The latter court said:

> "We find this suggestion utterly without merit. The effect of *Keyes* was before the district court during the trial on liability, it having been decided on June 21, 1973, a time when that trial had been reopened. The School Committee did not seek a reopening on the issues presented by *Keyes;* it described *Keyes* as a restatement of the principles of the earlier Supreme Court decisions. In any event, the district court found

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that the record was sufficiently complete to apply *Keyes,* 379 F. Supp. at 479, and that finding was not challenged on appeal." A-32 n. 26.

Most of this Petition depends on this attempt to relitigate an issue which both lower courts found to have been litigated once, at the liability stage, by the Boston School Committee's able counsel (James St. Clair, Esquire, and the firm of Hale & Dorr).[1]

2. While the Petition discusses the theories which it sought to raise below, it does not describe the plan embodying those theories, which would have left massive segregation in the Boston public schools. Under the plan's own projections, at least 75 out of about 159 schools would have been less than 35% white or more than 75% white. Schools more than 90% or less than 10% white were found in Roxbury (Home and School Association plan, Appendix, pp. 8-10, 12, 81, 106, 119), Dorchester (pp. 54-57), South Boston (p. 66), Hyde Park (p. 68), West Roxbury (pp. 70, 72, 117), Charlestown (pp. 78, 94, 134), East Boston (pp. 80, 90, 138), the South End (pp. 4, 63), and the Fenway (p. 6).[1a] These are conservative estimates: schools whose districting is not specifically described in the plan would probably also, under its principles, be segregated. The plan, moreover, left in effect most of

[1] This Petitioner became a defendant-intervenor on December 27, 1974, subject to the District Court's limitation that issues decided by that Court's opinion of June 21, 1974, were not to be relitigated. Nevertheless, Petitioner has continually sought to reargue that the scope of the violation was more limited than the finding of the District Court, and, *a fortiori*, that the Courts below erred in affording near-comprehensive relief. Regardless of the limitations upon intervention, and of the inappropriateness in any event of relitigation now of the District Court's violation finding, this view of the violation is simply wrong on the record. And in an effort to reinter this spectre, we summarize the violation finding, as to which this Court has previously denied certiorari, *Kerrigan* v. *Morgan* and *White* v. *Morgan*, 421 U.S. 963 (1975), in an Appendix to this Brief.

[1a] Many of the pages cited describe more than one such school.

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the State Plan originally imposed under state law (see No. 75-1445, A. 62-63), while arguing that that plan went "far beyond" (p. 3) the remedy called for by the Petitioner's remedial theories, and should be replaced as soon as possible by a still less inclusive plan.

This is the result to which the Petition's theories lead, even in a school system in which the District Court found that the authorities "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities. . . ." And that "the entire school system of Boston is unconstitutionally segregated." *Morgan* v. *Hennigan*, 379 F. Supp. 410, 482 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). It is not a result required by practicalities: the District Court was able to frame a plan desegregating the schools without any unusual length or quantity of busing, while offering students a choice between schools in their own community school districts and citywide magnet schools (No. 75-1445, A. 85-86, 88, 92, 184-87; A-3-9-40). As the Petition's Appendix E shows, black residential areas in Boston form an elongated, central band no part of which is far from white areas. Rather, the Petitioner argues that, regardless of practicalities, a court simply has no power to seek meaningful, system-wide relief even on the overwhelming showing of segregative acts found in this case supporting the District Court's finding of system-wide segregation affecting "the entire school system".

Argument

I. The Association's Theories as to the Scope of the Violation Are Untimely, Inappropriate for Consideration by This Court, and Baseless.

The first three sections of the Petition center around the same claim: that even when intentional segregative acts substantially affecting schools have been shown, the

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court should not "make every effort to achieve the greatest possible degree of actual desegregation" (*Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971)) but should rather calculate the racial composition each school would have had absent unconstitutional acts and desegregate only to the extent needed to reach that composition. The factual premises of this theory were rejected in this case at the violation stage. In any event the Petition's arguments are not appropriate on this record for consideration by the Court and are wholly inconsistent with this Court's decisions.

A. *The Factual Premises of the Petition's Theory Have Been Rejected.*

At the violation stage of this case, the District Court found multiple and pervasive unconstitutional practices "affecting all of the city's students, teachers and school facilities" and yielding unconstitutional segregation of "the entire school system of Boston": it concluded that the defendants did not "produce 'evidence supporting a finding that a lesser degree of segregated schooling' in any part of the system would not have resulted even if they had not acted as they did". 379 F. Supp. 481-82, quoting *Keyes*, 413 U.S. at 211. The District Court thus found that the defendants—not residential patterns—are responsible for the segregation of the Boston schools, 379 F. Supp. at 469-74. These findings were based on detailed evidence of discrimination in school construction, portable classroom location, districting, overcrowding policies, feeder patterns, transfer policies, teacher hiring and assignment, and other practices. 379 F. Supp. at 425-69.

The Petition's present attempt to fractionate segregation in the Boston schools, attributing most of it to private action (pp. 9-11, 15-16), is barred by these findings reached in an earlier part of the case and affirmed on appeal. The Petitioner cannot challenge these findings, not only be-

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cause of familiar principles of res judicata and law of the case, but because the terms on which it was allowed to intervene expressly forbid it to "reopen any question or issue which has been decided previously by the court, including the findings of fact and conclusions of law in the court's opinion of June 21, 1974" (Order Allowing Intervention, 12/27/74).

The Petition's claim (pp. 5-6, 15-16) that the previous findings should be reopened because the defendants at the violation stage had no chance to rebut the *Keyes* presumptions presents no issue warranting certiorari. The claim was rejected by the District Court which tried the case (A-4; transcript, 2/5/75, pp. 65-70) and termed "utterly without merit" by the Court of Appeals (A-32 n. 26). This Court should not review such a procedural finding since it is entirely devoid of general importance.

The finding, in any event, is plainly correct. *Keyes* was decided on June 21, 1973, when this case had been reopened to hear evidence relating to English High School. See 379 F. Supp. at 416. On July 3, the School Committee successfully moved to reopen as to various recent developments, but did not seek to introduce evidence as to *Keyes*. City Defendants' Motion to Reopen Record; City Defendants' Supplementary Requested Findings of Fact (7/3/75). On July 5, the District Court specifically requested argument on *Keyes* (transcript, 7/5/73, pp. 180-81). On July 13, the argument occurred, and School Committee counsel made no claim of surprise and sought no reopening. On the contrary, he described *Keyes* as "a restatement by the Supreme Court of the principles which are found in the earlier decisions of the Court" (transcript, 7/13/73, p. 38).[2] The District Court subsequently found the record sufficiently full to apply *Keyes* (379 F. Supp. at 479), and this was not challenged on appeal.

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[2] Nor were any *Keyes* claims included in a later, unsuccessful motion to reopen. 379 F. Supp. at 416.

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The specific claims raised by the Petition were rejected in the District Court's decision on the scope of the violation, which the Court of Appeals affirmed and this Court declined to review. The dispute then was not whether Boston's schools were segregated, but how they got that way. 379 F. Supp. at 425. The School Committee advanced the traditional defense "that the present segregation is not a product of their intent, but is 'due to factors over which the city defendants have had and have no control, or is due to the policy of providing neighborhood schools'" (509 F.2d at 584). The rejection of this defense on the basis of appropriate evidence (379 F. Supp. at 469-74) was nothing new. E.g., *Taylor* v. *Bd. of Educ.*, 294 F.2d 36, 39 (2nd Cir.), *cert. denied*, 368 U.S. 940 (1961). Nor was it new to prove a systemwide violation without presenting direct evidence as to every student. E.g., *Keyes*, 413 U.S. at 200, 209-10 (citing cases); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

Even the evidence described in the Petition repeats and is refuted by evidence already considered by the District Court at the violation stage. The Petition argues (pp. 10-11) that the School Committee had a "policy" of avoiding busing, but does not mention the District Court's finding that — policy or no policy — in 1972 more than 30,000 students used busing or public transportation to reach school. 379 F. Supp. at 456 n. 31; No. 75-1445, A. 92. (The plan now appealed from buses only 21,000 students for periods averaging 10-15 minutes (A-6, 20), making still more inappropriate the Petition's claim (pp. 14-15) that the lower courts have "callously" required "the involuntary transportation of thousands of elementary students".) The Petition explains (pp. 9-10) that in Boston white schools are typically in white neighborhoods, and black schools in black neighborhoods, but does not mention that tens of schools, and tens of portable classrooms, were deliberately placed

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in white or black neighborhoods to maximize segregation (379 F. Supp. at 427-30, 469-73) and that Boston's reliance on a neighborhood school assignment system was selective and was manipulated to promote segregation (379 F. Supp. at 432-38, 449-56, 473-75).[3]

What is said here is not inconsistent with *Swann*'s recognition that predominantly one-race schools may be explained by a showing that they did not result from past or present governmental discrimination. 402 U.S. at 26. The School Committee had its opportunity to make such a showing at the violation stage, under the standards set forth by *Keyes*, it tried and failed to do so, and neither it nor the Petitioner is entitled to a second chance.[4] See A-25-26. Nothing in *Swann* even suggests that a party allowed to intervene on terms that forbid relitigation of past issues is free to disregard those terms.

B. *The Petition's Theory Should Not Be Reviewed, and It Is Plainly Wrong.*

The Petition's theory that courts should compute the racial percentage schools would have had absent unconstitutional acts, and then seek to restore it, should not be reviewed on this record. For one thing, at the violation stage the District Court found systemwide violations "affecting all of the city's students" and "the entire

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[3] Evidence much like what the Petition describes was found inadequate to rebut the *Keyes* presumptions in *Keyes* v. *School Dist. No. 1*, 521 F.2d 465, 472 (10 Cir. 1975), *cert. denied*, ___ U.S. ___ (1976).

[4] The Massachusetts legislature, incidentally, has authorized payment of this Petitioner's legal fees in this case by the City of Boston, finding that the Petitioner is "an agency within the school department". 1975 Mass. Acts, ch. 716. This makes still less plausible the Petitioner's suggestion (p. 16) that it should not be bound by the violation findings made at a time when the School Committee and Superintendent were parties.

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school system" (379 F. Supp. at 482); and complete desegregation is thus required even on the Petition's own theory. As applied to the Boston school system by the Petitioner's own plan, moreover, that theory yields results which wholly discredit it. It would lead to massive remaining, court enforced segregation, despite the absence of practical impediments to desegregation and the pervasive constitutional violations found by the courts. (See Statement of the Case, part 2, above.) The District Court here approved a plan which did not seek or achieve racial balance (A-20, 39, 40; No. 75-1455, A. 74, 78), and which offered students a choice between schools in their community school districts and citwide magnet schools (No. 45-1445, A. 84-86). For this Court to uphold the Petition's theory in this case would be an utter rejection of the goal of desegregating unconstitutionally segregated school systems, and would subject to question the legality of dozens of plans adopted by lower courts on the authority of *Swann* and other cases.

There should be no question that the Petition's theory is inconsistent with this Court's decisions. *Keyes* made it clear that if segregative acts were "*factors* in causing the existing condition of segregation in" schools, "all-out desegregation" of those schools is required. 413 U.S. at 214 (emphasis added). The issue is whether "current segregation is in no way the result of those past segregative actions" 413 U.S. at 211 n. 17; see *id.* at 212 ("create or contribute to"). While the Petition discusses *Keyes* only in connection with its attempt to relitigate the violation findings in this case (pp. 5-6, 15-16), the whole drift of its argument is that *Keyes'* focus on identifying unconstitutionally segregated schools and parts of school systems (413 U.S. at 195-98, 203, 207-09) should be replaced by an attempt to fractionalize segregation within

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schools. Even when a court, properly applying *Keyes*, has found systemwide segregation at the violation stage, the Petition (pp. 11-12) would allow segregation to continue where it could be shown at the remedy stage that white schools were in white residential areas.

Even before *Keyes*, it was clear that, once a school has been significantly affected by the segregatory practices of school officials, that school must be desegregated to the extent practicable, not just desegregated to some fractional extent. In *Davis* v. *Bd. of School Comm'rs*, 402 U.S. 33 (1971), this Court remanded for the attainment of "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation", even though under the plan approved by the Court of Appeals the remaining black schools were "the result of neighborhood patterns" (430 F.2d 883, 888 (5th Cir. 1979)). In *Swann* too, the Court dealt with state action "creating or *maintaining*" segregation (402 U.S. at 21, 28 (emphasis added)), and did not attempt to disentangle the percentage of segregation at each school resulting from state action. The Court was well aware of residential segregation (402 U.S. at 25), but nevertheless upheld a remedy desegregating the whole system.[5] Lower courts have reached similar results. *Kelly* v. *Guinn*, 456 F.2d 99, 108 n. 9 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *Keyes* v. *School Dist. No. 1*, 521 F.2d 465, 476-77 (10th Cir. 1975), *cert. denied*, —— U.S. —— (1976); A-26 n. 20 (citing cases). The goal is not to readjust racial percentages but "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green* v. *County School Bd.*, 391 U.S. 430, 442 (1968).

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[5] See also *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480 (1976). The violation here was citywide; all the Boston public schools are controlled by a single school committee (379 F. Supp. at 421-22, 480-81).

The reasons for this result were cogently set forth by the Court of Appeals (A-28-31). To say what the racial composition of schools would have been absent discrimination is impossible, particularly when school officials have not followed a neighborhood school policy, and where their own acts (e.g., school placement) have influenced segregated residential patterns. *Swann*, 402 U.S. at 20-21; *Keyes*, 413 U.S. at 201-04. Here, for instance, some discriminatory practices (e.g., teacher assignment and student transfer policies) pervaded the whole system, while even the more localized violations affected dozens of schools. 374 F. Supp. at 426-30, 433-37, 442-45, 459, 466-68, 472. To desegregate by fractions would leave many individual black children, victims of segregation, in segregated schools, since even the Petitioner does not claim that it can tell where individuals would have been absent discrimination. It would involve the court in carefully preserving all supposedly untainted remnants of segregation. And it would disregard the impact that intentional state action imprinting a racial stamp on schools has on the "hearts and minds" of students in those schools, even on students who have not themselves been moved from one neighborhood to another. See *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494 (1954); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 465-66 (1972); *Keyes*, 413 U.S. at 196.

C. *No Issue Calling For Review Has Been Raised Under the Equal Educational Opportunities Act of 1974.*

The Petition's argument (p. 13) that the Equal Educational Opportunities Act of 1974, and in particular 20 U.S.C. § 1712, prohibits "busing based on a broad-brush presumption" (i.e., *Keyes*) should not be considered at

this stage of the case. The Petition contends (p. 14) that "the Court of Appeals emasculates this clear Congressional statement of national policy by interpreting the Act to require no examination of the 'scope' or extent of the constitutional wrong which needs to be remedied". But consideration of the "scope" of the violation here took place at the violation stage of this case, when it was concluded that "all of the city's students, teachers and school facilities", were affected by unconstitutional practices. 379 F. Supp. at 482. This conclusion was based partly on *Keyes*, but it was mainly on massive, more direct evidence of intentional segregation. See 379 F. Supp. at 481. Nothing in the Act even purports to require relitigation of the violation at the remedy stage.[6]

In any event, the Act does not seek to shrink the nature or scope of constitutional violations. 20 U.S.C. § 1712, on which the Petition relies, says only that the courts should use "only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the law", but nowhere attempts to define what a "particular denial" is. The Act twice states that its purpose is to "specify appropriate *remedies*" for constitutional violations (20 U.S.C. §§ 1701(b), 1702(b) (emphasis added); see also §§ 1712, 1713). Neither the Act nor its legislative history purports to modify the *Keyes* standards for appraising violations.

If anything, the Act *supports* continued adherence to preexisting standards of unconstitutionality, including *Keyes*. The Act provides that "the rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public

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[6] The Act does contain a carefully limited provision, inapplicable here, which allows reopening of remedial busing orders harming health or education (20 U.S.C. § 1717).

schools shall be uniform throughout the United States" (20 U.S.C. § 1753), a provision whose reenactment (see P.L. 92-318, § 805) apparently endorses *Keyes'* recognition of nationwide rules of law for the appraisal of violation claims.[7]

Moreover, the Act provides that "the provisions of this title are not intended to modify or diminish the authority of the courts of the United States to enforce fully the Fifth and Fourteenth Amendments" (20 U.S.C. § 1702(b)). See *Brinkman* v. *Gilligan*, 518 F.2d 853, 856 (6th Cir. 1975). This language is wholly inconsistent with the Petition's theory that the Act seeks to render constitutional practices found unconstitutional on the basis of *Keyes*. And of course, Congress has no power, even if it wished to, to legalize unconstitutionally segregated schools. *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n. 10 (1966); see *Oregon* v. *Mitchell*, 400 U.S. 112, 128-29, 204 n. 31 (1970); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *North Carolina Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971); *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

The District Court faithfully implemented the Act: by minimizing busing; by using magnet schools, school closing and construction, and student transfer as alternative remedies; and by providing for community school districts (No. 75-1445, A. 84-86, 92-93, 104-08, 132, 136, 152-53, 171, 184-85). The Court of Appeals thoroughly reviewed compliance with the Act (A-14-22, 31 n. 24, 51). No significant issue remains for consideration by this Court.

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[7] The Act also creates a statutory cause of action for denial of equal education opportunity which may in some respects go beyond *Keyes*. 20 U.S.C. § 1703 (forbidding *inter alia* certain segregation on the basis of sex or national origin, and failure to overcome language barriers).

II. No Issue Warranting Review Is Raised Concerning the Examination Schools.

The District Court's interim requirement that at least 35% of the 1975 entering class at three examination schools be black or Hispanic (A-41-44) raises no issue warranting review here.

The order was a one-year measure, based on the absence of practical alternative means of desegregation. The examination schools had been found unconstitutionally segregated at the violation stage (379 F. Supp. at 466-68; 509 F.2d at 593-94), while the advanced work classes which provided at least 25% of their student body (A.44 n. 37) were also segregated and predominantly white (379 F. Supp. at 433 & n. 16; 509 F.2d at 594 n. 20). Various proposals presented by the defendants relied on an unvalidated examination[8] and were unsupported by any data showing their actual effect on the schools' compositions, while such evidence as was available suggested that they would not desegregate the schools (No. 75-1445, A. 101-02). The District Court therefore adopted a percentage minimum for the coming year, while encouraging the development of alternatives thereafter (No. 75-1445, A. 102, 162; A-44).

Because the order part was interim and part of a system-wide desegregation plan, it raises no issues as to the propriety of "quotas" in other areas. At the most only whether the District Court abused its discretion is involved. As the School Committee has not suggested that it will throw out the black students admitted under this

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[8] The Petition argues, that lack of validation is irrelevant when admission to a program requiring academic ability is involved (p. 18). Surely, however, one cannot assume that *any* entrance test measures the ability required for *any* program. Desegregation courts have always regarded with suspicion attempts to maintain segregation by the use of "objective" tests. E.g., *McNeal* v. *Tate County School Dist.*, 508 F.2d 1017 (5th Cir. 1975) (citing cases).

order should this Court reverse, the dispute may now be moot. *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). Since this Petition was filed, in fact, the District Court has issued plan modifications for 1976-77, which do *not* carry forward the 35% requirement. In future years, moreover, the situation may be modified by new state regulations, which provide:

> Because selective secondary schools have had atypical student bodies in the past, such selective secondary schools, including but not limited to selective academic high schools, regional vocational-technical schools and trade schools, shall admit qualified applicants of each sex and racial and ethnic groups in numbers proportionate to the existence of members of such class in the secondary school population of the geographic area served by that school. After the period for application to the school has closed, if it is found that qualified applicants of one of the above classes have not applied in numbers sufficient to maintain this proportion, qualified students of the other categories may be selected to fill the remaining openings.[9]

In any event, the order was plainly proper. It was not based on any theory that the plaintiffs have a substantive constitutional right to have schools contain a percentage of black students equal to their percentage in the school system. The District Court rejected any such theory (No. 75-1445, A. 74, 78) and provided for schools ranging from 30% white to 70% white to 95% white in East Boston (A-20, 39, 40). The 35% minimum which it fixed at the examination schools was smaller than the percentage of

[9] Chapter 622 Regulations Pertaining to Access to Equal Educational Opportunity, adopted by Mass. Bd. of Educ. June 24, 1975, effective September 1, 1975.

black and Hispanic students in Boston (A-41 n. 33; see A-42 n. 34). The burden was on those proposing less effective measures to show their propriety (*Swann*, 402 U.S. at 26; *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968)), and that burden was not carried (A-43-44). Suspicion of exclusive reliance on unvalidated tests to select entrants was particularly appropriate here, where the authorities had not only segregated black students but also provided them with inferior teachers (A-30), harming their ability to compete. See *Gaston County* v. *United States*, 395 U.S. 285 (1964). The 35% minimum, moreover, was limited to entering classes, while the other classes at these schools remain overwhelmingly white (No. 75-1445, A. 100; A-42). To take this moderate desegregative step, in the absence of effective alternatives or of data validating the status quo, was well within the court's power.

The court, furthermore, had to prepare a plan for an entire school system, after the local authorities had repeatedly defaulted (A-3-4, 13, 49-50, 56-57). All reasonable means were available to the court. *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484 (1976). A vital part of the plan was the use of magnet schools to encourage voluntary desegregation (No. 75-1445, A. 84, 158-77). To have maintained the examination schools—among the largest and most magnetic in the system—in their overwhelmingly white status[10] would have seriously impaired the plan's desegregative power by providing a haven for white students seeking white schools (see A-41). These schools, themselves unconstitutionally segregated, had no right to detach themselves from the remedial process going on in the system. And since they draw students from throughout

[10] Two of these schools were 7% and 10% black and Hispanic. The third was about 30% black and Hispanic, but by the same token relatively unaffected by the court's 35% minimum. No. 75-1445, A. 100.

Boston, no "neighborhood" or transportation considerations militated against attainment of the court's moderate minimum.

III. No Issue Warranting Review Is Raised Concerning "White Flight."

One wholly adequate ground for the lower courts' refusal to consider "white flight" from the Boston public schools was their conclusion that the likelihood that school desegregation would accelerate such flight had not been established. White students were leaving the Boston schools long before desegregation began. The District Court found that it would be "presumptuous" to predict the effect of desegregation plans on long-term population movements, citing the similar conclusion of the Masters (who heard expert testimony on the subject). No. 75-1445, A. 81 n. 7.[11] The Petitioner tried to upset this conclusion in the Court of Appeals with affidavits, but that Court emerged from a blizzard of untimely submissions with the conviction that no expert consensus on the relation between desegregation and white flight had appeared (A-34 n. 29). The Petitioner now returns to the fray with newspaper citations (p. 20). If it considers these, the Court should also consider weighty recent scholarship to the contrary. *Symposium on White Flight* (G. Orfield ed. 1975) (Center for Nat'l Policy Review, Catholic University Law School); Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46 Harv. Ed. Rev. 1 (1976). But this Court should not reevaluate the findings made below, consider evidence not of record, and plunge on this record into the midst of an unresolved dispute

[11] The Court was more willing to consider possible residential instability within Boston, because of the smaller distances involved (75-1445, A. 88, 91).

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among social scientists. *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4483 n. 11 (1976).

White flight cannot in any event "be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490-91 (1972); accord, *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450, 459 (1968).[12] Any other rule would subject desegregation plans to the wishes of white parents, and would require courts to direct their attention to keeping whites in cities, as opposed to remedying constitutional violations by eliminating segregated schools. See *Milliken* v. *Bradley*, 418 U.S. 717, 746-47, 756 n. 2 (1974).[13]

Even were "white flight" proven and relevant, it would have no bearing on this case. Any attempt to use "white flight" considerations to choose between desegregation plans would require assessment of their different impact on white flight, a task which seems wholly impracticable (A-36 n. 30). The Petitioner did not argue to the District Court that "white flight" considerations supported its own plan, which had been rejected by that court before "white flight" was raised as an issue. Nor was the plan suggested by the Masters designed on any theory that desegregation and white flight are related, since the Masters found that theory a "misleading fiction" (No. 75-1445, A. 81 n. 7). Surely, after the elaborate litigation that has already occurred, the Petition's arguments do not warrant discarding the plan now in operation in order to plunge anew into the planning process. Even the School Committee's petition (No. 75-1445) does not seek such a result.

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[12] The Court, however, relied on predictions of white flight to prevent dilution of a desegregation plan. *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972). That is not in question here.

[13] *Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 1975) (relied on by the Petition, p. 21) is distinguishable. The court there relied on the fact that the school system *already* had an 85% black student

Nor does the operation of the present plan constitute a basis for review. Desegregation has not been trouble-free in Boston, but the vast majority of Boston's one hundred-sixty some schools are working realistically on a constitutional basis. There have been well-publicized difficulties at a relative handful of schools, but those difficulties do not stem from the plan. Rather, they stem from incessant attacks upon desegregation, the courts and the law itself by some private persons and some public officials who would have the Constitution and the rule of law honored in Topeka and Little Rock but not in Boston.

Conclusion

The violation trial in this case was litigated with much vigor, and resulted in comprehensive findings of fact (379 F. Supp. 410) which were upheld on appeal (509 F.2d 580, *cert. denied*, 421 U.S. 963). The plain consequence of those findings, under well-established principles laid down by this Court, was that "root and branch" desegregation was required in Boston. New parties opposed to that result have sought to avoid it, both by challenging the violation findings in hindsight and by proposing new—or rather, old and rejected—remedial principles. This Petition in particular calls on this Court to reopen findings concurred in by two courts at the violation stage (pp. 15-16), to reject the standards for constitutional violations recognized in *Keyes* (pp. 13-14), and to abandon the requirements of *Green*, *Swann* and *Davis* (p. 19). These proposals, inappropriate in any event, are singularly so here, in light of the pervasiveness of the constitutional violation (379 F. Supp. 410), the total default and obstruction of the

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body and a majority black faculty, administration and school board to conclude that equal educational opportunity did not require extensive further desegregation; it made no reference to white flight.

school authorities (A-3-4, 13, 49-50, 56-57), the practicability of the District Court's plan (No. 75-1445, A. 85-86, 90-92, 184-87; A-20, 39-40), and the limits on the Petitioner's intervention. The Petition's theories, moreover, are built on an assertion about the prior course of this litigation rejected below as "utterly without merit" (A-32 n. 26) and a constitutionally irrelevant sociological theory that is questioned even by sociologists (A-34 n. 29).

The plan adopted by the District Court reflects careful and sensitive considerations of the constitutional violations found in Boston, the decisions of this Court, and the practical problems of desegregation. Attacked from three sides at once, it was affirmed by the Court of Appeals in a thorough opinion by Chief Judge Coffin. Nothing even close to an abuse of discretion can be shown, much less a case requiring this Court's consideration. Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX

The segregation which concededly existed in the Boston public schools was found by the District Court to have been intentionally caused by the defendants. 379 F. Supp. at 424-25, 480-82. This finding parallelled similar findings by the U.S. Department of Health, Education and Welfare, the Massachusetts Commission Against Dscrimination, and the state courts. 379 F. Supp. at 418-21, 431, 450-51. Some but not all the facts supporting the District Court's findings are summarized below.

1. At more than 25 schools, officials packed students into overcrowded segregated schools or maintained vacant seats at other segregated schools, rejecting remedies which would have reduced segregation because of white opposition even though these very remedies were freely used when they would not desegregate. 379 F. Supp. at 425-27. Hundreds of white students from outside South Boston, for instance, attended overcrowded, all-white South Boston High. 379 F. Supp. at 475.

2. More than 40 portable classrooms were placed so as to keep students in segregated schools, while proposals for desegregative placement of portables were rejected with the assertion that portables are "educationally undesireable." 379 F. Supp. at 427-28.

3. At least 18 out of 20 new facilities built or converted without state scrutiny opened segregated; proposals (made under state financial pressure) to open unsegregated schools were resisted and evaded. 379 F. Supp. at 428-32. The school department bought a building in a 98% white residential area, and created a 7% white school there by busing in black students. 379 F. Supp. at 429. Knowing that public housing projects were segregated, officials systematically built small schools within or near them,

ensuring that the schools would also be segregated. 379 F. Supp. at 470-73.

4. School officials maintained school district lines for tens of schools which were inexplicable in terms of distance or safety factors, but which coincided with racial residence patterns. 379 F. Supp. at 433-47. While adopting district changes that increased or continued segregation, officials rejected all proposals for redistricting with desegregative effects, and sabotaged commitments to desegregative redistricting forced on them under state law. 379 F. Supp. at 433, 437-41.

5. School officials established and changed "feeder patterns" affecting promotion from one school to another, creating or maintaining segregation at about numerous high, junior high and middle schools. 379 F. Supp. at 441-449.

6. Throughout the city, the defendants maintained a student transfer policy which enabled thousands of students to leave schools in which their race was in the minority — a use openly defended by school Committee members — and which was discriminatorily administered. 379 F. Supp. at 449-453. When forced by financial pressure to discontinue this practice, the defendants honeycombed the replacement with segregative exceptions, one deliberately concealed from state officials. 379 F. Supp. at 452-56.

7. Again throughout the city, school officials deliberately segregated teachers, and used policies concentrating inexperienced teachers in black schools. 379 F. Supp. at 459-63. They also discriminated in hiring and promotion. 379 F. Supp. at 463-66. Such practices imposed a racial stamp on every school in the city.

8. School officials segregated Boston's three "elite" high schools, and vocational programs at about five other schools. 379 F. Supp. at 466-69. Of all the segregative practices described so far, this is the only one for which

the District Court found relied even in part upon the presumptions set forth in *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973); in other areas, direct evidence of segregative intent and effect sufficed. 379 F. Supp. at 481. Even in this area, the Court's conclusion was buttressed by substantial further evidence. 379 F. Supp. at 469; 509 F.2d at 594.

9. The School Committee's "neighborhood school policy" was "so selective as hardly to have amounted to a policy at all." More than a third of the students used transportation to reach school. 379 F. Supp. at 429, 456 n. 31, 475. "The neighborhood school has been a reality only in areas of the city where residential segregation is firmly entrenched." 379 F. Supp. at 473.

10. The effects of the School Committee's segregative actions could not be limited to any section of the city, but were system-wide. 379 F. Supp. at 474-76, 481-82. The record as a whole, moreover, strongly supported the Court's finding of segregative intent. 379 F. Supp. at 479-80. Ultimately, relying on *Keyes*, the Court found the whole system unconstitutionally segregated. 379 F. Supp. at 482.

The segregative practices found in this case, in sum, were far more extensive than those in *Keyes*, where, out of 119 schools, only 8 were found directly affected. 413 U.S. at 191-92, 199 n. 10. The Court there made clear that —in the absence of rebuttals by the defendants—such a showing could support systemwide violation findings and relief. 413 U.S. at 203-04, 209-09, 213-14. Since no plausible rebuttal was made by the defendants here (379 F. Supp. at 467), it was the inescapable mandate of *Keyes* that the School Committee "has the affirmative duty to desegregate the entire system 'root and branch.' " 413 U.S. at 213.

MAY 19 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONER

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONER

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

The respondents Massachusetts Board of Education and Commissioner of Education (hereafter referred to collectively as the Board of Education) file this brief in opposition to the petition for writ of certiorari filed by the Boston Home and School Association (the Association). The Board of Education is obligated by state law to see that the Boston School Com-

mittee complies with constitutional requirements. Mass. Gen. Laws c. 15, § 1G. Although a defendant in this case, the Board was exonerated of any liability by the district court below and retained in the case to assist with remedies.

The petitioner Association is an agency of the Boston School Department; its legal fees in this case are paid by the City of Boston. 1975 Mass. Acts & Resolves, c. 716. It is the elected city-wide governing body for over 100 local home and school associations, whose membership is not restricted to or necessarily governed by parents and teachers.

Opinions Below

The opinions below are as stated by Petitioner. Petitioner did not reproduce the remedial opinion of the district court in its appendix. Reference to that remedial opinion will be cited to the appendix to the Boston School Committee's petition for certiorari, No. 75-1445, as "B.S.C.A." References to the record on the Association's appeal to the court of appeals will be cited as "H."

Questions Presented

1. Whether the United States Court of Appeals for the First Circuit erred in affirming the district court's rejection of the remedial theory, remedial plan, and related evidence advanced by the Home and School Association in the remedy phase of this case.

2. Whether the court of appeals erred in holding that the desegregation plan adopted by the district court was a proper exercise of its equitable powers.

Statement of the Case

The petitioner Association seeks review of the decision of the United States Court of Appeals for the First Circuit affirming decisions of the District Court for the District of Massachusetts that established a systemwide desegregation plan for the Boston public schools; rejected a limited plan offered by the Association; and rejected certain evidence offered by the Association.

On June 21, 1974, the district court issued its decision holding that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). There was no dispute that the school system was characterized by racial segregation. The question before the district court was "whether the defendant [School Committee members] have intentionally and purposefully caused or maintained racial segregation in meaningful or significant segments of the Boston public school system, in violation of the Fourteenth Amendment." *Morgan* v. *Hennigan*, 379 F. Supp. at 425. The district court answered this question affirmatively after a careful examination of six principal areas: (1) facilities utilization and new structures; (2) districting and redistricting; (3) feeder patterns; (4) open enrollment and controlled transfers; (5) faculty and staff; and (6) vocational and examination schools. *Id.*

The School Committee had argued that school segregation in Boston was an inevitable consequence of segregated housing patterns and a growing black population. It had further argued that it simply had adhered to a valid neighborhood school policy in making student assignments to the system's schools. *Morgan* v. *Hennigan*, 379 F. Supp. at 469. Nevertheless, the district court found that the Committee had, "with awareness of the racial segregation of Boston's neighborhoods, deliberately incorporated that segregation into the school system." *Id.* at 470. The court also concluded that the neighborhood school policy was largely fictitious:

> As for the defendants' asserted neighborhood school policy, findings heretofore made prove that it was so selective as hardly to have amounted to a policy at all. Several practices of the defendants were antithetical to a neighborhood school system: extensive busing, open enrollment, multi-school districts, magnet schools, citywide schools and feeder patterns. *Id.* at 473.

It further stated that the districting for elementary schools was inconsistent with a neighborhood school policy; distance and safety became factors only when useful to maintain segregation; and "neighborhood" schools were used only where residential segregation was firmly entrenched. *Id.*

The district court considered whether there was "a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district," as was required by *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 213 (1973). It made a factual finding that no section of the city was "separate, identifiable and unrelated." *Morgan* v. *Hennigan*, 379 F. Supp. at 475-76. Further, the district court found that the defendants did not

present sufficient proof to support a finding that the segregation in any part of the system did not result from or was not maintained by purposeful action by the Committee. *Id.* at 481. Indeed, independent of the reciprocal effects of the Committee's actions, certain of their practices had a direct segregative impact on the entire school system. *Id.* at 482. Accordingly, the district court held that the entire school system of Boston was unconstitutionally segregated. *Id.* The decision of the district court was affirmed on appeal. *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

This Court delivered its *Keyes* opinion on June 21, 1973, after the main trial on liability in the district court, but before that court issued its decision on June 21, 1974. The liability trial was reopened on June 20, 1973, and in March, 1974, the Committee moved to reopen and present new evidence in light of *Keyes*. The district court held a special hearing on the effect of *Keyes* on July 13, 1973, at which time then counsel for the Committee, James St. Clair, Esq., argued that segregation in Boston, unlike Denver, was due to segregated neighborhood patterns and that the *Keyes* decision simply extended doctrine contained in prior decisions by this Court (Tr. 7/13/73, pp. 42-43).

During the remedial stage of the case the district court permitted the Association to intervene on the condition that it could not "reopen any questions or issue which has been decided previously by this court" (H. 63). The Association presented its own plan to the district court, a plan which would have continued in effect, with a slight degree of additional desegregation, the limited racial balance plan implemented under state law and adopted as an interim desegregation plan by the district court for the 1974-1975 school year. The Association's plan conceded that at least 75 schools would remain segregated (*i.e.*, less than 35 percent or more than 75

percent white), although the number was likely to be much higher (H. 77-80, 88-90, 102-08). The district court rejected the Association's plan as a matter of law (B.S.C.A. 68), a decision affirmed on appeal (A. A-22 to A-33).

In support of its plan, the Association made an offer of certain evidence purporting to show that segregation in Boston resulted primarily from housing patterns. The district court refused to admit the evidence on the grounds that the extent and cause of segregation in schools had been litigated and decided at the liability stage (H. 162). This finding was affirmed on appeal (A. A-33).

The desegregation plan ordered into effect by the district court contains eight community school districts ranging from 40 to 95 percent white (B.S.C.A. 127-57), in a system that is 51 percent white (B.S.C.A. 181). Schools within the districts may vary from such district compositions by $\pm$ 25 percent of the district compositions (B.S.C.A. 180).[1] Thus, the allowable range for individual schools in the community districts is from 30 to 100 percent white. There is a citywide magnet school system, ranging from 46 to 56 percent white (B.S.C.A. 181). The transportation in the plan is not excessive, as claimed by petitioner. The plan requires 21,000 students to be bused, as compared with 17,000 students bused under the state racial balance plan in effect in 1974-1975, and as compared with 30,000 students who were bused or used public transit prior to desegregation (B.S.C.A. 92, 185). The average distance travelled is 2.5 miles (B.S.C.A. 184); the average time involved is between 10 and 15 minutes each way (B.S.C.A. 184).

[1] For instance, in a district that is 40 percent white, individual schools may range from 30 to 50 percent white, because 25 percent of 40 = 10 percent.

Reasons for Denying the Writ

I. Review Should Be Denied Because The Lower Courts' Rejection Of The Association's Remedial Theory And Related Evidence Was In Accord With This Court's Decisions, And Represents The Only Fair And Practical Result.

A. *The Lower Courts' Refusal To Adopt The Association's Remedial Theory Was Mandated By This Court's Decisions And The Practical Realities Of The Case.*

The Association's principal argument offers once more the theory it attempted unsuccessfully to advance in the remedy proceedings before the district court.[2] This theory asserts that a district court's responsibility in the remedial phase of a desegregation case is solely to identify and remedy those portions of segregation existing in particular schools that are attributable to the official conduct of school authorities. The evidence the Association proffered under this theory would have attempted to show that much of the segregation in the Boston school system was not caused by actions of the School Committee, but rather by unrelated residential patterns. As a result, the Association contends, the district court's systemwide remedy went too far.

The court of appeals fully considered the merits of the Association's theory in its opinion (A-23 to A-33). Its rejection of

[2] The Association has included two additional arguments in its petition. One relates to the enrollment in the Boston school system's examination schools (*see* Pet. 17-18); the other, although inexplicit, appears to concern the issue of "white flight" (*see* Pet. 19-21). The issue concerning the examination schools is discussed *infra* at 15-17. The question of "white flight" is presented more clearly in the petition filed by the Mayor of Boston, No. 75-1441, and the Board of Education respectfully refers the Court to the Board's brief filed in opposition to that petition for its response to the similar argument appearing in the Association's petition.

the theory and related evidence is plainly mandated by the findings of systemwide discrimination in the prior liability proceedings in this case. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 427-29, 433, 435-37, 449-56, 469-473, 481-82 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). It is also required by the applicable decisions of this Court. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 203, 213 (1973); *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 21, 28 (1971); *Green* v. *County School Board of New Kent County*, 391 U.S. 431, 437-38 (1968). Finally, the circuit court's decision is in complete accord with the Tenth Circuit Court of Appeals' opinion in *Keyes* v. *School District No. 1, Denver, Colo.*, 521 F. 2d 465, 476 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 806 (1976), where the defendant Denver School Board raised the identical argument.

The Association's argument would require that parties and courts in desegregation cases engage in a two-step inquiry into the causes of segregation in each school building in the school system under scrutiny. The first would occur at the liability stage of the proceedings, to determine whether the school system as a whole was unconstitutionally segregated. The inquiry would then be repeated at the remedial stage, apparently to quantify the amount of unconstitutional segregation on a school-by-school basis in order to frame an appropriate remedy limited solely to the officially segregated portions of segregated school buildings. As the court of appeals recognized, this approach to the remedy phase of a desegregation case is "squarely contrary to the remedial principles" articulated by this Court (A. A-26).

The mandate of "remedy" cases such as *Swann*, *Davis*, and *Green* is unequivocal: where a school *system* has been shown

to be unconstitutionally segregated and dual in nature, the responsible school authority (or, upon its default, the district court) must fashion a remedy that will achieve a unitary school *system* with "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis*, *supra*, 402 U.S. at 37. Thus the ultimate focus of inquiry at both the liability and remedy stages is not a particular school or set of schools, but the *system* taken as a whole. The focus is identical regardless of whether the unconstitutional segregation found that the liability stage resulted from state statutes or policies (as in the South) or from actions of local school authorities (as in northern systems such as Boston). *See Keyes*, *supra*, 413 U.S. at 213, quoting from *Green*, *supra*, 391 U.S. at 438. There is not the slightest suggestion in any of this Court's decisions on desegregation remedies that, once a finding is made of systemwide *de jure* segregation, the district court or the parties may then retrace their steps to inquire into the cause of segregation in each of the system's schools. *See Keyes*, *supra*, 413 U.S. at 213 and 203; *Keyes*, *supra*, 521 F. 2d at 476.

The district court here found that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan*, *supra*, 379 F. Supp. at 481-82. As the court of appeals pointed out in its opinion presently under challenge, the time for specific inquiry into the causes of segregation in each of the schools in the Boston school system was then over. The district court was required to fashion a remedy that would reach every school in the system (A. A-27 to A-28).

The Association's reliance on certain isolated phrases from *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Milliken* v. *Bradley*, 418 U.S. 717 (1974), to support its restricted remedial theory is wholly misplaced. When the excerpts from this Court's opinion in *Swann* quoted at page 11 of the Petition are considered in their proper con-

text, it is plain that they refer to the necessary distinction between comprehensive remedial steps directly and properly designed to eliminate a dual school system, and more questionable steps designed to reach other types of racial discrimination — for example, in housing or employment — that may constitute the underlying and indirect causes of segregation in the schools; only the latter steps are criticized by the Court. The Association nowhere suggests, however, that the district court's remedial plan attempts to accomplish or even deal with any problem other than the dismantling of Boston's unconstitutionally segregated school system.[3]

Nor does *Milliken* v. *Bradley*, *supra*, aid the Association's argument. As stated by the court of appeals (at A. A-30, n. 23), the *Milliken* decision is entirely consistent with the principles set forth in *Swann* and other remedy cases. The limita-

[3] The Association also relies (*see* Pet. 11-12) on language in the *Swann* opinion providing that at the remedy stage school authorities may attempt to justify the continued existence of some segregated schools in their proposed remedial plan by proving that the segregation is not the result of past or present official discrimination. 402 U.S. at 26. The court of appeals thoroughly disposed of this argument in its opinion (A. A-28, n. 21) by pointing out that the cited language in *Swann* has no application in a case such as this where the remedy proceedings are preceded by a full trial on liability:

> In *Swann*, the school authorities were afforded the opportunity to satisfy this burden [of overcoming a presumption that schools remaining segregated in a proposed desegregation plan are the result of official discrimination] at the remedy stage of the proceedings because there had been no trial on liability. Here, of course, the school authorities have had their chance.

For the reasons stated by the court of appeals, the Association's reliance on this portion of the *Swann* opinion is unjustified.

tion *Milliken* places on a district court's equity powers in fashioning desegregation remedies relates solely to its authority to order a cross- or inter-district remedy upon a finding of unconstitutional segregation in a single school district. The Boston school system, of course, constitutes only one district. Because the desegregation plan below affected only the Boston school system, the *Milliken* limitation is inapplicable. *See Keyes, supra,* 521 F. 2d at 476-77, n. 8.

Not only is the rejection of the Association's remedial theory fully in accord with prior decisions of this Court, it also represents the only practical decision that could have been reached. Contrary to petitioner's assertions, the district court held in the liability stage of this case that the School Committee had not followed a genuine neighborhood school policy and had constructed new schools at locations designed to preserve the existing segregated patterns of residential neighborhoods. *Morgan* v. *Hennigan, supra,* 379 F. Supp. at 423, 427-29, 469-74. This Court has recognized the segregatory impact that such actions by school officials can have on residential patterns. *Keyes, supra,* 413 U.S. at 201-203 and 211-213; *Swann, supra,* 402 U.S. at 20-21. In light of the proven history and character of the segregatory actions taken by the School Committee in governing the Boston school system, the circuit court was clearly correct in concluding that the task of "delineat[ing] the effect of illegal state action on the school populations in most of the particular schools," as suggested by the Association (Pet. 8-9), would be "awesome" if not impossible (A. A-29).

Finally, troubling inequities would arise upon acceptance of the Association's remedial theory. As the court of appeals described, such a remedy would fail to vindicate the rights of individual students in the Boston public schools (A. A-29). In addition, implementation of the Association's remedy would engage the federal courts in "planning continued segregation

and then perpetuating the community and administrative attitudes and psychological effects which desegregation should assuage" (A. A-30). The Association does not, and could not, deny that its remedy might well have the effects described by the court of appeals. In these circumstances it is clear that the court was correct in affirming the district court's refusal to consider the Association's remedial theory. The same considerations of fairness militate against further review of the lower courts' decisions by this Court.

B. *Rejection Of The Association's Proffered Evidence Properly Followed The Lower Courts' Refusal To Adopt Its Remedial Theory.*

Because the rejection by the courts below of the Association's remedial theory was correct as a matter of law, there was no error in the district court's refusal to admit the evidence offered by the Association in support of its theory. Principles of res judicata and the law of the case warranted the exclusion of the Association's evidence as an attempt to relitigate the issue of the School Committee's responsibility for the segregated character of the Boston public schools (A. 32). The evidence was also properly excluded on the grounds that it went outside the scope of the order allowing the Association to intervene, and that it was an attempt by an agent of the Committee not to be bound by findings against the Committee. Such procedural matters are not worthy of this Court's review.

Contrary to the Association's contention, the timing of this Court's *Keyes* decision is irrelevant. In its liability decision the district court found systemwide discrimination based on systemwide evidence; it relied on the *Keyes* burden-shifting presumptions only in regard to the unconstitutional segregation found in Boston's examination and vocational schools. *Morgan* v. *Hennigan*, *supra*, 379 F. Supp. at 481. Moreover, the Association simply presented an erroneous view of the record in this case when it suggests that *Keyes* was not available to the Committee or its counsel during those proceedings (*compare* Pet. 15-16 *with* A. A-31, A-32 and n. 26). The Association also errs in suggesting that the validity of applying the *Keyes* presumptions in the liability stage of this case would not have been a proper issue for appeal had the Committee chosen to raise it (*compare* Pet. 16, n. 10, *with* A. A-32, n. 26). On the actual record of this case, the court of appeals was clearly correct in affirming the district court's decision to refuse introduction of the proffered evidence. As the court of appeals stated, its decision was required by settled principles of res judicata or preclusion. *See, e.g.*, *White* v. *Higgins*, 116 F. 2d 312, 317-18 (1st Cir. 1940); *Bee Machine Co.* v. *Freeman*, 131 F. 2d 190, 192-93 (1st Cir. 1942), *aff'd*, 319 U.S. 448 (1943); *Hodgson* v. *Brookhaven General Hospital*, 470 F. 2d 729, 730 (5th Cir. 1972). *See also Keyes*, *supra*, 521 F. 2d at 473 (evidence pertaining to issues of liability resolved in this Court's *Keyes* decision held inadmissible).

The proffered evidence also goes outside the scope of the Association's permitted intervention, which prohibited the Association from relitigating issues decided at the trial on liability (H. 63). The reasonableness of such a limitation is buttressed by the fact that the Association is an agency of the Boston School Department. 1975 Mass. Acts & Resolves, c. 716. Further, the evidence the Association sought to introduce is remarkably similar to evidence presented by the Committee at trial (*see* liability trial exhibit and transcript references set out in the record below at H. 1-62).

In sum, this Court should decline to review the lower courts' decision to reject the Association's evidence where the sole purpose of this introduction was to reopen issues previously put to rest after full adversary proceedings. The courts' rejection was based on established, time-honored rules of finality.

C. *The Lower Courts' Refusal To Accept The Evidence Offered By The Association Was Not In Disregard Of The Equal Educational Opportunities Act Of 1974.*

The Association's further reliance on the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758 (particularly § 1712), to support the introduction of the evidence it offered is misplaced. Section 1712 provides that a court may "impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws." It contains no statutory requirement as argued by petitioner (Pet. 14) that at the remedy stage a district court is to review the scope of the "constitutional wrong" at issue or to define the "particular denial" of equal protection needing a remedy without regard to its findings at the liability stage.

The Association's argument is based on an erroneous reading of the Act. The explicit purpose of the Act is to "specify appropriate remedies for the orderly removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b). *See id.*, § 1702(b). It does not address in any manner the scope of constitutional violations that require a desegregation remedy. Rather, as the court of appeals stated, it is intended to channel and direct the remedy fashioned by the district court after the court has determined that denials of equal protection exist in a school system and has identified their parameters (A. A-17 to A-18).

When the section of the Act relied on by the Association is read in light of the Act's governing purpose, it is clear that the "particular denials of equal educational opportunity or equal protection of the laws" refer to the constitutional violations already found by the district court. In this case the district court found that the entire Boston public school system was unconstitutionally segregated. *Morgan* v. *Hennigan*, *supra*,

379 F. Supp. at 481-82. The "particular denial" of equal protection, therefore, was systemwide and the district court was constitutionally required to effect a systemwide remedy. *Keyes*, *supra*, 413 U.S. at 203; *Swann*, *supra*, 402 U.S. at 15-16; *Green*, *supra*, 391 U.S. at 438. The court of appeals correctly observed that the Act explicitly disclaims any intention of diminishing or modifying a district court's authority and responsibility to meet this constitutional obligation (A. A-17). *See* 20 U.S.C. § 1702(b).

The court of appeals' application and construction of the Equal Educational Opportunities Act of 1974 in this case was mandated by the clear provisions of the statute itself and follows this Court's analysis of a similar statute earlier passed by Congress. *See Swann*, *supra*, 402 U.S. at 17-18 (Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c). Furthermore, the court's interpretation of the Act is in complete accord with that adopted by the Sixth Circuit Court of Appeals. *Brinkman* v. *Gilligan*, 518 F. 2d 853, 856 (6th Cir. 1975). Thus there is neither an important, unsettled question of federal law presented by the Act nor a conflict in its interpretation among the circuits that might render this aspect of the decision an appropriate subject for Supreme Court review. Accordingly, review should be denied.

II. The District Court's Challenged Order Concerning Admissions To The Examination Schools Does Not Warrant Review.

The Association also asks this Court to review the interim order of the district court which required, for the 1975-1976 school year, that at least 35 percent of the entering seventh

and ninth grade classes of Boston's three examination schools[4] be black or hispanic students. By virtue of the Memorandum and Orders Modifying Desegregation Plan issued by the district court on May 3, 1976, however, the original interim order has become moot. Review by this Court is therefore unwarranted.

The district court's May 3 orders provide that, for the 1976-1977 school year, all students entering the examination schools for the first time must score in or above the 50th percentile on either of two ranked lists of students who took the Secondary School Admission Test (SSAT).[5] Applying this admissions formula to the ranked lists, the small number of students entering the existing ninth grade class will be composed of at least 35 percent black or hispanic students; the entering seventh grade class, however, will have only 26 percent black or hispanic students. Thus the "flat 35% requirement" in the district court's order which the Association attacks (Pet. 17) will no longer be operative.[6] The Association's request for review is therefore obsolete.

Even if the district court's recent orders on the examination schools have not rendered the court's original interim order moot, they unquestionably bear out the wisdom of the court of appeals' conviction that the district court would continue to "monitor the progress of desegregation in the examination schools and [would] adjust its future orders to assure the

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[4] The three schools are Boston Latin School, Boston Latin Academy and Technical High School. They represent the elite schools in the Boston system, offering students greater college and career opportunities than do the other schools. *See Morgan* v. *Hennigan, supra*, 379 F. Supp. at 466.

[5] One list ranks applicants solely by SSAT scores; the other ranks by SSAT scores combined with grade point average.

[6] In addition, it should be noted that the reliance the new orders place on SSAT scores satisfies the Association's apparent objections concerning the district court's original rejection of a remedy based on these scores (Pet. 17-18).

continued vitality of these schools as elite institutions" (A. A-44). The orders demonstrate that desegregation of the examination schools is a flexible, ongoing process which this Court should not interrupt by reviewing a remedial order that will soon be outdated. Rather, the Court should continue to rely on "the informed judgment of the district court[ ] in the first instance" to continue the same careful process of review and adjustment which has characterized its treatment of the examination schools to date. *Swann, supra,* 402 U.S. at 28.

Conclusion.

For the reasons stated above, the Boston Home and School Association's petition for a writ of certiorari should be denied.

Respectfully submitted,

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BOSTON HOME AND SCHOOL ASSOCIATION,
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TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
RESPONDENTS.

REPLY BRIEF OF THE PETITIONER, BOSTON HOME AND SCHOOL ASSOCIATION, TO RESPONDENTS' BRIEFS IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONER,

v.

TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
RESPONDENTS.

REPLY BRIEF OF THE PETITIONER, BOSTON HOME AND SCHOOL ASSOCIATION, TO RESPONDENTS' BRIEFS IN OPPOSITION

I

At page 5 of the Brief of Plaintiffs, Tallululah Morgan, et al. (hereinafter "Plaintiffs") in Opposition to the Boston Home and School Association's Petition, plaintiffs argue that "the factual premises of the Association's theory" (i.e. that the racial imbalance found in a substantial number of Boston public schools was the result of causes other than illegal School Committee action)

"were rejected in this case at the violation stage", so that the Association's evidence offered at the remedy stage was properly rejected. But the question of the effect of School Committee action on those particular schools was not even raised at the liability trial. If "the factual premises of the Association's theory" were rejected, this was done by a retroactive application of the *Keyes* presumption after the close of trial, without fair opportunity to litigate the rejected "factual premises".

Nor is it true, as contended by plaintiffs (page 3) and by the Massachusetts Board of Education (hereinafter the "State Board") (pp. 4-5) that either lower court found the issue of the effect of School Committee action on the racial imbalance in particular schools to "have been litigated once at the liability stage" (page 3) or that the issue of the inclusion of particular schools within the scope of the Court's remedial decree had previously been "tried" (page 8). Indeed, the District Court described the issue raised by the Association's theory and evidence as "somewhat novel". (Record Appendix II, 166). The general findings of the District Court referred to at page 4 of the State Board's Brief regarding the School Department's failure to adhere to a neighborhood school system (extensive busing, open enrollment, multi-school districts, magnet schools, city-wide schools and feeder patterns) related exclusively to the high schools, middle schools, and particular elementary schools which would have been desegregated under the Association's remedy. There is nothing in the record to indicate that *any* of the above exceptions to the neighborhood school system affected any of the approximately 100 elementary schools involved in the Association's particularized offer of proof, and the Association's proof would have shown the contrary. (Record Appendix II, 206). Similarly, the Association's remedy would have desegregated the schools which were

constructed at "locations designed to preserve existing patterns of residential neighborhoods". (State Board's Brief, page 11). The *only* evidence in the record regarding the effect of residential segregation on racial imbalance in the schools at the liability trial was offered *by plaintiffs*, and for the purpose of proving that, as a general proposition, all of the racial imbalance in the schools could not be attributed to causes other than racial discrimination. Record Appendix II, 1-62; see the State Board's Brief, p. 13. We have no quarrel with that evidence, or with the District Court's rejection of the School Committee's attempt to use that evidence as a complete defense to liability, by arguing that it showed that *all* racial imbalance in all of the schools was attributable entirely to residential segregation. See the State Board's Brief, p. 4. *No* evidence (other than that which the Association sought unsuccessfully to introduce — Record Appendix II, 170-210) is to be found in the record as to what, if any, effect School Committee action had on the racial imbalance in the approximately one hundred particular elementary schools involved in the Association's particularized offer of proof — an issue which was simply not litigated.

The lower courts did find that this issue *might* have been litigated, had School Committee counsel been clairvoyant before *Keyes*, or had such counsel successfully sought to reopen the liability trial after *Keyes* for that purpose. However, it is unclear why the School Committee should have sought to do this in view of the District Court's express separation of the trial between liability and remedy, and it is, at best, unclear that any such motion could have been successful.[1] Indeed, the contrary is indicated by the fact that the motion of the school committee referred to on page 5 of the State Board's Brief, which it

[1] The plaintiffs argued in their Brief to the Court of Appeals that such a motion should, in any case, have been denied.

describes as a motion "to reopen and present new evidence in light of *Keyes*", was *denied* by the District Court on March 18, 1974. And, while it is true that a considerable time elapsed between the decision of this Court in *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189 (1973) and the District Court's decision on liability (June, 1974), plaintiffs fail to point out that the Equal Educational Opportunities Act of 1974 was not enacted until August 21, 1974, over two months *after* the District Court's liability decision was handed down.

The fact is that by rejecting the Association's evidence proferred at the subsequent hearings on remedy, the District Court refused to even consider the only evidence offered the Court which would have permitted the fashioning of the particularized remedy permitted by *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189, (1973), and mandated by the Equal Educational Opportunities Act of 1974.

II

Plaintiffs further contend that the Association's desegregation plan (which was summarily rejected by the District Court) "would have left massive segregation in the Boston public schools" (page 3). The State Board makes a similar contention (pp. 5-6). However, this argument, like the contention that the Association's theory "would lead to massive remaining, court enforced, segregation" (Plaintiffs' Brief, p. 9; see State Board's Brief, pp. 11-12), begs the question by assuming that the segregation which must be judicially eliminated is *all racial imbalance* which exists in the schools, whatever its cause, rather than that resulting from illegal School Committee action. The fact that this Court's decisions in *Green* v. *County School Board,* 391 U.S. 430 (1968)

and *Davis* v. *Board of School Commissioners*, 402 U.S. 33 (1971) have been so misinterpreted in spite of the clear disclaimer of any such intended result in *Swann*, in *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972) and in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), has led, in Boston as elsewhere,[2] to sweeping remedial orders which are not commensurate with any realistic assessment of the scope of the constitutional wrong.

III

Plaintiffs and the State Board further argue that consideration of the merits of the Association's position should be precluded because it seeks to violate the terms under which the Association was permitted to intervene, i.e. that the Association would not relitigate previously litigated issues. But the Association sought only to litigate an issue (the effects of School Committee action on the racial composition of a large number of particular schools) as to which the Court had heard *no* evidence. Nor do even the District Court's sweeping general findings resulting from retroactive application of the *Keyes* presumption contradict the Association's contention that the racial composition of many schools did not result from illegal state action. We do not dispute the District Court's findings that, in some manner, the violation affected every school. Indeed, the Court's findings on discriminatory teacher assignments alone make this clear. From this it should not automatically follow that the remedy must require the racial balancing of every school. In addition, neither the District Court nor Court of Appeals strictly construed the terms of the intervention so as to preclude

[2] Chief Justice Burger found "disturbing" this common misreading of *Swann* which interprets the duty to "desegregate" schools as being the equivalent of a duty to "racially balance" schools, in *Winston-Salem/Forsyth County Board of Education* v. *Scott*, 404 U.S. 1221 (1971) at 1227.

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full consideration on the merits of the Association's legal argument.[3]

IV

Plaintiffs assert (page 4) that in Boston there are no practical difficulties to prevent complete desegregation (by which they mean all-out racial balancing). By "practicalities", plaintiffs refer only to the physical logistics and completely ignore the devastating practical obstacles of heightened racial animosity and violence,[4] massive loss of middle class students from the system and disruption and the virtual collapse of education in many schools, which have resulted from involuntary assignment of thousands of elementary students far from their neighborhoods. The "practicality" that this judicial policy strikes the average citizen as (1) unjust, (2) unnecessary and (3) a totally unacceptable intrusion into his or her private life, is dismissed as legally irrelevant or "not constitutionally recognized". (Appendix to the Association's Petition, A-37). In the same way, plaintiffs (p. 11) and the State Board (p. 12) speculate that permitting the continuation of imbalanced schools might have an adverse effect on the "hearts and minds" of students, (page 11), but ignore the immeasurable psychological trauma which the present remedy entails.

V

Nor is the repeated mischaracterization of the Association's theory as an attempt to "fractionalize" or "frac-

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[3] The District Court gave, as the "real bottom line" of the Court's rejection of the Association's evidence, its view that the Association's theory was "simply contrary to constitutional law as I understand it". Record Appendix II, 168.

[4] One measurable criterion of the extent of the social disruption caused by the Court's sweeping order is the anticipated cost of police overtime resulting from the necessity to assign a large number of police to patrol the schools ($10,192,045 this year).

tionate" segregation within each particular school (Plaintiffs' Brief, pages 5, 9 and 11) a fair description of the Association's position. The Association does not seek to "fractionalize" or "fractionate" segregation within particular schools. Rather, the Association has sought an opportunity to demonstrate that the racial imbalance in most of Boston's approximately one hundred elementary schools as to which no specific School Committee action was found by the Court was not the result of School Committee action. By prohibiting the Association from offering such evidence, the courts have deprived themselves of any factual basis upon which a remedial decree could be tailored which would have the more modest and practical objective of remedying the "particular denials" of constitutional rights resulting from School Committee action. 20 U.S.C. §1712.

Nor are plaintiffs correct in contending (page 9) that such an approach is inconsistent with this Court's decision in *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). Indeed, after this Court remanded in *Keyes*, the District Court, though expressing doubt that "these issues are proper for retrial here", 368 F. Supp. 207, 210 (D. Colorado, 1973), admitted evidence very similar to that sought to be introduced by the Association in this case.[5] The Circuit Court disagreed with the District Court's view that such evidence was "somewhat beside the point", 521 F.2d 465 (10th Cir. 1975) at 471, and held that such evidence was not only relevant to the issues raised on remand, but "bore importantly on the issue". *Ibid.* 471-472.

Plaintiffs themselves point out (page 12) that the Equal Educational Opportunities Act of 1974 provides that "the

[5] "The intended thrust of that evidence has been that segregated conditions in individual schools outside the Park Hill area are wholly the product of external factors such as demographic trends and housing patterns, and are in no way the product of any acts or omissions by defendants." 368 F. Supp. at 210

rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States" (20 U.S.C., §1753), a provision, they say, "whose reenactment (see P.L. 92-318, §805) apparently endorses *Keyes'* recognition of nationwide rules of law for the appraisal of violation claims." Far from supporting the lower courts' rejection of the Association's evidence, however, the quoted language clearly supports the Association's position that evidence respecting the effect of residential segregation on racial imbalance in particular schools should have been received. This was done not only in *Keyes* itself on remand, *supra*, but also in at least two recent cases decided since *Keyes*, namely, *Carr* v. *Montgomery County Board of Education*, 377 F. Supp. 1123 (M.D. Alabama, 1974), *affirmed*, 511 F.2d 1374 (5th Cir. 1975) (where the Court found, after an evidentiary hearing with respect to the proper scope of the remedy, that a number of racially imbalanced schools need not be desegregated because their racial imbalance was shown to have been "a result of residential patterns and not of the school board's action—either past or present", 377 F. Supp. at 1132); and *Northcross* v. *Board of Education of Memphis*, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974) (where the Circuit Court affirmed a desegregation plan which had left untouched numerous racially imbalanced schools, in part because "minority groups concentrate in urban areas", 489 F.2d at 17.

In both *Carr* and *Northcross*, moreover, the effect of residential patterns on particular schools was considered even though the cases involved southern school systems where *all* of the school desegregation had been originally state-imposed by statute.

VI

With respect to the examination schools, the contention of the plaintiffs' statement (pages 14 and 15) and of the State Board (p. 16) that the issue raised by the District Court's imposition of a quota is now moot, because the modified plan for 1976-1977 does "*not* carry forward the 35% requirement", is, at best, inaccurate. Though the District Court's order of May 3, 1976, for next year did make the 35% quota somewhat less inflexible, in that it will not apply except to black and Hispanic students who score above the 50th percentile in either the Secondary School Achievement Test (SSAT) or a combined SSAT exam and Grade Point Average score, the District Court's Order still requires a racial preference be given up to 35% of the black and Hispanic students who score above the 50th percentile, thus favoring those minorities over better qualified[6] white, oriental and American Indian applicants.

Nor can we understand how the new State regulations referred to at page 15 of the plaintiffs' Brief, which themselves appear unconstitutionally to require that a preference be given on the basis of racial classification, can cure the District Court's imposition of a particular racial balance on the examination schools in contravention of the express injunction of *Swann*.

VII

Finally, plaintiffs (p. 7) and the State Board (p. 6) "mix apples with oranges" when they compare the estimated number of high school children who voluntarily took "buses or public transportation" prior to desegregation,

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[6] In its May 3, 1976, Order, the District Court also conceded, contrary to plaintiffs' contention (page 14), that the SSAT exams had been validated as having "at least some predictive validity". (District Court's Order, page 12).

with the number who are now involuntarily bused, which latter number includes many thousands of elementary school students, almost all of whom had walked to the elementary schools in their immediate neighborhoods prior to the advent of court-ordered busing. Record Appendix II, page 206.

Conclusion

By interpreting the duty to "desegregate" to require the attempted racial balancing of every public school of a large northern city, where evidence has been offered to prove that the racial imbalance found in many of those schools is due to the "myriad factors of human existence", including the very ethnic segregation referred to in *Swann*,[7] rather than to School Committee action, the District Court here and elsewhere has embarked on an endless and ultimately self-defeating attempt to order a remedy which will "embrace all of the problems of racial prejudice, . . . when those problems contribute to disproportionate racial concentrations in some schools". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 23. The turmoil, disruption and loss of white students which has occurred in Boston, and which will only continue if further attempts are made to balance schools racially by further racial assignments in future years, cry out to this Court for additional judicial guidance for district courts in the exercise of their difficult duty to eliminate state-imposed segregation. We submit that the remedial guidelines laid down to date have not resulted in remedial decrees which fairly balance the unquestioned right of minority children to be free from the effects of state-imposed segregative acts with the equally important right of innocent citizens

[7] 402 U.S. at 22

of all races to be free from unwarranted federal intervention into their personal lives.

Respectfully submitted,

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SUPREME COURT, U. S.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on June 14, 1976, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. The Decision in *Pasadena City Board of Education, et al.* v. *Spangler, et al.*, No. 164, October Term, 1975.

On June 28, 1976, following the denial of certiorari in the instant case, this Court handed down its decision in *Pasadena City Board of Education, et al.* v. *Spangler, et al.*, which recognized the limits "beyond which a court may not go in seeking to dismantle a dual school system." 44 L.W. at 5117. The Court said that "These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation", and went on to prohibit continual reassignments of pupils to schools where there was "no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools . . . were in any manner caused by segregative actions chargeable to defendants", but were rather attributable to a "quite normal pattern of human migration [which] resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some schools." *Ibid.* The Court concluded that the scope of the remedy should not extend to racially balancing such schools, "as these shifts were not attributed to any segregative action on the part of defendants". *Ibid.*

The Court's holding is on all fours with the petitioner's contention that the District Court's order in Boston should not have reassigned pupils to require racial balancing in the approximately 110 Boston schools in which the racial imbalance could similarly be shown to have been the result, in the first instance, of "quite normal patterns of human migration [which caused] changes in the demographics of [Boston's] residential patterns", (see petitioner's offer of proof outlined at pp. 9-11 of the petition, and attached maps, Exhibits C - F), but should rather have been limited to the approximately 50 particular schools

in which the racial imbalance was found to have been caused, in whole or in part, by School Committee action.

In *Pasadena*, this Court also decided that the School Board's continuing failure to fully desegregate teacher and administrator hiring and promotion did not warrant a continuing duty to require racial balancing in every school. This holding is identical to the petitioner's contention that the District Judge's sweeping mandatory injunction (which had as its goal the racial balancing of every Boston public school) was not warranted by that Court's previous finding of a dual school system, where the only segregatory effect of School Committee action found to have affected about 110 out of Boston's 160 schools related to discriminatory teacher and administrator assignments, rather than to any School Committee action causing racial imbalance (petitioner's reply brief, p. 5).[1]

We can conceive of no reason why the same guidelines and logic that the Court has now specified regarding the proper scope of a remedial decree after a mandatory injunction has once been issued, should not also be applicable to determine the proper scope of a mandatory injunction in the first instance.

II. The Justice Department's Involvement

We feel that the highly publicized reversal by the Justice Department of its original decision to request this Court to grant our petition has unwittingly caused us prejudice. The primary reason for the reversal appears to have been the Attorney General's concern that the

[1] There we pointed out that "We do not dispute the District Court's findings that, in some manner, the violation affected every school. Indeed, the Court's findings on discriminatory teacher assignments alone make this clear. From this it should not automatically follow that the remedy must require the racial balancing of every school."

Justice Department's backing of our petition would have been misconstrued as a vindication of the violence which has accompanied desegregation in Boston. This fear appears to have overridden the Department's original consideration of the strict legal merits of our petition, which, in argument before this Court on the *Pasadena* case, Solicitor General Bork suggested merited the Court's attention.

The petitioner cannot control the actions of everyone in Boston, but it *has* exhorted its 60,000 members from the very beginning of these proceedings that the only proper forum in which to seek relief from the District Court's sweeping mandatory injunction is through the courts, and *not* through resorting to violence in the streets or school buildings of Boston.

The petitioner is comprised of over 125 local parent-teacher associations throughout the city, almost all of which have conducted themselves in a legal, responsible and peaceful way. The South Boston High School local chapter, where most of the violence has occurred, has actually been expelled from the Boston Home and School Association for over a year because it is controlled and officered by other than parents of children in the school, in violation of the petitioner's by-laws.

The constructive role of the petitioner was explicitly recognized by the District Court in its Order of December 16, 1975, placing South Boston High School in receivership, wherein the Court said (p. 11, note 3):

> "The Association described is the South Boston *High School* Home and School Association and is to be distinguished from the Home and School Association of South Boston, which is part of an alliance of district associations which has participated constructively in these proceedings, represented by Thayer Fremont-Smith, Esquire, and whose president, Mrs.

Marie Clarke, serves on the executive committee of the Citywide Coordinating Council appointed by the court."

Solicitor General Bork made it clear (both to this Court during argument in *Pasadena*, and in a meeting with petitioner's counsel) that he considered our position with respect to the proper scope of a remedy in a northern city with close-knit ethnic residential neighborhoods, to be legally correct. Even when the Attorney General finally decided not to take the unusual step of intervening prior to this Court's granting a petition, the Justice Department made it clear (both in public announcements and in conversations with petitioner's counsel) that the Department *would* file a brief in support of our position should the Court decide to grant the petition.

The President, in filing legislation with the Congress (which legislation, like our petition, would limit the scope of desegregation remedies to the specific schools whose racial imbalance was caused by unlawful acts of a local school board, rather than housing patterns),[2] has described large scale court-ordered busing as "an issue of profound importance to our domestic tranquillity and the future of American education" (*Boston Globe*, June 25, 1976).

Even if this Court were to disagree with our arguments, and to affirm the decisions below, its reasoning could not help but clarify the guidelines for other large northern cities with ethnic neighborhoods (e.g., Chicago, Philadelphia and Los Angeles) where desegregation suits are now being contemplated.

The great majority of Boston parents, although they perceive the District Court's Order as a threat to their

[2] Spokesmen for the Justice Department described this legislation as encompassing the same arguments which would have been made to this Court had the Department decided to file the brief it had prepared in support of our petition.

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neighborhoods and an infringement on their personal liberties (see separate Appendix, pp. 6, 8, 11, and 12) have peacefully obeyed the law and looked to the courts for redress of their grievances. We submit it is manifestly unfair to deprive these citizens and the nation of their day in court before the country's highest tribunal, simply because a relatively few citizens have behaved in an illegal, irresponsible, and despicable manner.

Conclusion

If this Court has read our submissions and reads the Committee report published as a separate Appendix hereto, it cannot be ignorant of the agony of Boston. The denial of certiorari can only be interpreted to mean either this Court is insensitive to that agony, or feels incapable of devising any better remedial guidelines. We find it difficult to accept either alternative.

For the reasons set forth above, as well as those contained in its petition for writ of certiorari and reply brief, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Text of Mayor White's Committee on Violence Report Issued June 25, 1976

Members of the Committee are as follows:

THOMAS MCGEE, Speaker of the State House of Representatives, a Democrat, cochairman.

DAVID NELSON, Suffolk Superior Court judge, cochairman.

United States Senator EDWARD W. BROOKE, a Republican.

GERHARD BLEICKEN, chairman of the John Hancock Mutual Insurance Co.

RICHARD HILL, chairman of the First National Bank.

HUBERT JONES, MIT professor and former head of the Roxbury Multi-Service Center.

AVI NELSON, Herald-American columnist and WNAC-TV talk show host.

W. DAVIS TAYLOR, president and publisher of The Boston Globe.

EDWARD MCCORMACK, former state attorney general.

REV. MICHAEL HAYNES, pastor of the 12th Baptist Church.

REV. WALTER WALDRON of Holy Cross Cathedral.

REV. ROBERT GOLLEDGE, vicar of the Old North Church.

FRIEDA GARCIA, director of the Consultation and Education Program at Boston University Medical Center.

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Following is the text of the report of the Mayor's Committee on Violence:

You appointed the undersigned to serve on an ad hoc committee to study the causes of racial violence and tension in our city and to report the result of our deliberation to you. This report is made in compliance with that mandate.

We wish to emphasize that this is a collective report. While it is the product of individual contributions based on objective evaluation of discussion with various individuals who appeared before us, and on intra committee dialogue, the findings, conclusions, suggestions and recommendations are to be considered by you, in whole and in part, as a group effort.

I. Procedure

A. We elected Thomas W. McGee and Davis A. Nelson as co-chairmen of the committee.

B. We unanimously voted that no subject of deliberation or statement by any person meeting with us would be quoted or made public.

C. We met at the Boston Public Library on 10 occasions, with practically total attendance on each occasion.

D. Persons meeting with us, listed alphabetically and not in order of their appearance, included:

1. Gregory Anrig, Massachusetts Commissioner of Education
2. Robert Dentler, court-appointed expert, Dean, Boston University School of Education
3. Robert DiGrazia, Boston Police Commissioner
4. Raymond Flynn, State Representative — South Boston
5. Louise Day Hicks, President Boston City Council
6. Ellen Jackson, Director Freedom House Institute of Education

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7. Dennis Kearney, State Representative — Charlestown, East Boston
8. James Kelly, President South Boston Home and School Association
9. Mel King, State Representative South End.
10. John Kerrigan, Member Boston City Council
11. John McDonough, Chairman Boston School Committee
12. Evelyn Morash, State Board of Education
13. Elvira Palladino, Member Boston School Committee
14. Kathleen Sullivan, Member Boston School Committee
15. Bill Owens, State Senator Mattapan
16. Mortin Walsh, Regional Director of Community Services, U.S. Department of Justice
17. Kevin H. White, Mayor, City of Boston

E. We worked without staff, save for Ms. Teri Weidner of your office who assisted in scheduling participants. The purpose for eliminating staff participation was to make the product of our deliberations be that of the principals you named to serve, not that of a professional staff person. Our meetings covered all facets of life in the city including, but not limited to, those that were social, political, educational, economic and legal.

F. The areas into which we formally voted to make specific inquiry included:

1. School structure and school administration
2. Public Safety
3. Unemployment
4. Housing
5. Summer jobs and recreational opportunities for the young.

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II. Background

A. It is sad that Boston, the cradle of liberty where the first shot was fired in pursuit of American freedom and the first blood shed by men of both black and white skin for the cause of American justice, should on the occasion of our Bicentennial celebration be portrayed across the nation and around the world as a city of racial tension.

Boston, like much of the nation, has seen a change in attitude in the last decade from one where anything was possible to one where everything and everyone is suspect.

B. We are living in a city that should be the envy of the nation and the world as far as quality of living is concerned. We are the medical center of the world; our colleges, museums, theatres, performing arts centers, etc. are unsurpassed anywhere. The concept of free public school education originated in Boston, and our colleges, universities, business and banking institutions have agreed to participate in improving the quality of those public schools. But Boston is not the Shangri-La of cities. This city which has been in the forefront in the never-ending struggle for human dignity and equal opportunity is being torn apart by violence which has racial overtones.

C. We are witnessing a struggle between whites and blacks who are angry, bitter and frustrated because of poverty, unemployment, poor housing, inferior education, and court-ordered busing.

It is not the typical confrontation of the poor against the rich, the young against the old or the urban inner-city disadvantaged against the suburban affluent. The city is in chaos because ethnic groups which have much in common are each giving vent to their frustrations against those others because those others seem somehow responsible for their unsatisfactory station in life. In fact, all should be working together to improve the schools, to create decent housing out of unsanitary living accommodations, to make

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the streets and public transportation system safe, to protect their homes and families, to fight for jobs and to seek a voice in the shaping of the destiny of themselves, their children and their children's children.

D. In this setting, Mr. Mayor, you formed this Committee to meet with political and community leaders who would not or could not meet with one another. You told us that we were not to hold "hearings" in the traditional sense, but rather, we were to meet and listen. We were not to debate; we were to discuss. We were not to proselytize; we were to be educated. We were to listen to their arguments, but not to argue the merits thereof. These things we have done.

E. You asked us to combine our knowledge of the city, free of preconceived prejudices to the extent that is possible, with the information imparted to us by those with whom we met. Then we were to report to you what the problems are, and recommended what you, as chief executive of this troubled city, could do to resolve them and make a start toward bringing hope, understanding and progress back to Boston.

F. We do not pretend to have made an in-depth, fact-finding study; that would take months, not weeks. Nor can we state that we heard from all segments of our society; that would require at least 70, not seven, sessions.

What we can report is that this committee has had the unique opportunity to have frank discussions and free exchange with leaders of the black community, the anti-busing forces, law enforcement officials, educational representatives, and those raising otherwise unheard voices of moderation. This would not have been possible, in our opinion, without two important factors being present:

1. You appointed to this committee men and women of diverse views from varied stations of life. As a result, each person who met with us felt that he or she was not

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in a totally hostile environment. Because of the composition of this committee, such persons could feel that they had "friends in court;" and

2. A promise was made, and kept, that persons meeting with us could talk without having their remarks quoted and their positions denounced or praised by this committee or individual members hereof.

III. Findings

1. School structure and school administrations

A. Lack of Communications. The significant lack of communication between blacks and whites results in neither side giving much credence to the conflicting concerns of the other — i.e. the concern for the blacks for equal educational opportunity and the elimination of a dual school system in which the black system was inferior to that offered to the whites, and the white concern about the possible destruction of a close-knit community and the loss of control over the education and the destiny of their children.

B. No Compromise Attitude. Many of the persons who met with us were so totally convinced that their side's cause was right and that the "other side" had no justification for its position that they have adopted an "unconditional surrender" or "total victory" mentality. They left no room for moderation or compromise in such a posture, and they demonstrated no willingness to concede that maybe, there is a scintilla of legitimacy to the other side's concerns. However, we believe that we could discern, even from the most militant, areas in which, with proper leadership and communication, a consensus could be reached.

C. Lack of Representative School Committee. In a School System that exceeds 50% black and other minorities, there is no minority representation on the Boston School Committee. Practically all persons who met with us conceded that, under the proper circumstances, this should be remedied.

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D. Boston School Committee.

1. The fact that the Boston School Committee by official action created a dual school system has been decided by a U.S. District Court and affirmed by the U.S. Circuit Court of Appeals and the U.S. Supreme Court.

2. The Boston School Committee is not now fully responsible for running our public school system. At present, three entities have assumed or have been delegated such responsibility: the School Committee, the Superintendent and Judge Garrity.

3. Because of the omnipresence of the Court, the Committee (and the Superintendent) are unable to make operative fiscal and educational decisions, as well as personnel assignments. Responsibility for these now lies at the doorstep of a non-educational agency, the court.

E. School System Under Judge Garrity Order.

1. Of 165 schools in the system, 150 appear to be working well. This fact ought to be publicized more.

2. The conflict between the School Committee, Superintendent and Judge Garrity as to who sets and carries out school policy is a deterrent to the system's reaching a maximum level of quality education. For example, three million dollars was set aside for occupational resources, but it could not be utilized because of failure to appoint an administrator. This failure was the result of conflict between the Committee and the Superintendent. The administrator was finally appointed effectively this June, and almost immediately reoffered his resignation because he saw no administrative commitment to the program.

3. The magnet schools are working well, but the input of colleges and universities, as well as business and labor, has not reached its full potential.

4. The massive police presence within school facilities is inimical to good education.

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5. Lack of uniform code of discipline causes conflict between counter-culture permissiveness and the approach of the strict disciplinarian. It also establishes a fertile field for rumor, charge and countercharge of unequal treatment in matters of discipline.

6. One person claimed that currently, the great majority of the schools in the Boston system have a higher level of civility, attendance and learning than the thirteen largest school systems in the country, but since busing began, the atmosphere of prejudice and frustration in a few of the schools has resulted in minimal education benefits to the attending students.

7. The experience of Boston Technical, Girl's Latin and Trotter School, all located in identifiably black neighborhoods but formerly populated by predominantly white students, would seem to indicate that, for some, the interest in quality education overrides any concern about the physical location of the facility. It should be added that these schools successfully attracted minority and majority students from all geographical areas and economic brackets in Boston. This was accomplished on a voluntary basis long before the court-ordered busing decree of 1974.

8. Many of those opposed to court-ordered busing feel that their historically close-knit community is being injured by the destruction of the neighborhood school system. They are angry and resentful of a program that seems to them imposed by decree and to be impervious to their political opposition. One possible consequence of the frustration with the limitations of the political process, aggravated by lack of information or too much misinformation, is a resort to violence. There are some who are frustrated and angry because of unemployment, poverty and alienation from government. For them, the orders acts as a catalyst.

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9. One of the tragedies is that the issue has become personal to all concerned citizens. They might not fully understand the issues, and they might have no understanding at all of the other side's problems, but they know where they stand.

10. Over 40 percent of Boston's school children are on welfare. The Title I Federal money, which is available to youngsters in poor school districts for food, etc., does not follow the child when he or she is bused to a school that does not qualify for Title I funding.

11. While we recognize that racial tensions have increased since the advent of court-ordered busing, the contention that there were no racial conflicts in the Boston Public Schools before Judge Garrity's order is contradicted by the fact that in October of 1970, the Boston School Committee appointed a commission "to investigate charges of disruption and violence . . . both within and immediately outside the Boston Schools." (See pp. 25-27 infra)

12. Phase II B of Judge Garrity's order should provide greater stability in those schools where the plan is working since the parents and the students can predict with certitude the schools the children will be attending in the future.

13. Many people who are against the court-ordered busing are hoping for moratorium on the program to serve as a cooling-off period. Although they and this committee recognize the unlikelihood of such an event, the idea has strong support in some quarters and equally strong opposition in others.

F. Community Involvement.

1. The people of Boston are tired and angry. They want to be left alone to walk the streets, drive through different neighborhoods, ride its public transportation and

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educate their children to their fullest potential free from the fear of random violence to which they may be subjected because of the color of their skin. To many, the answer to the safety question is stricter law enforcement with regard to crimes of violence and swifter, surer punishment for convicted offenders.

2. Others say that to achieve this the people must first become involved, individually and as a community. For some, no policy of action offers as much potential as the enlistment of community based resources. Organizations and leaders with credibility in their respective communities represent a source for dealing with the causes of violence.

It is the contention of some that the unwillingness of these organizations and leaders to get involved makes more difficult any proposed resolution of the problem.

3. Some would say if we are to have quality education in our schools, then we must have community participation and community acceptance. This does not mean that one must like Judge Garrity's plan or not seek modification within the legal or legislative system. An obvious concern of all in Boston is for the quality of education being offered the children, today. Active involvement in trying to improve the schools is important.

4. In most neighborhoods the parents and community leaders are playing an active role, but in some areas, the "them-against-us" attitude prevents any meaningful participation by responsible moderates.

If one tries to make the desegregation plan work in those areas where Judge Garrity's plan is opposed, he or she loses the status as "one of us" and becomes identified as "one of them." Conversely, if one tries to oppose the Judge Garrity plan in an area which favors it, he or she runs the same risk of being ostracized. The victims of this struggle are the children who are going un-

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educated at this time. No one in the city desires this result; yet, sometimes, those who are the most militant cause the more moderate majority to change their course of action because of their concern about peer or community rejection.

5. City wide Coordinating Council (CCC) was to be the eyes, the ears and the strong right arm of the Judge. It has proven to be too large, too deeply involved in internal struggles and it received insufficient backing from the court. The result of these inherent inadequacies has been that, although its function is a necessary ingredient to the court order, it has not led, has not arbitrated, has not conciliated and has not worked.

6. The feeling of pride in past accomplishments and hope for the future has been undermined and replaced in our different communities by hatred, fear, frustration and anger. We are a depressed city with depressed communities.

7. We recognize the feeling of the neighborhoods of Boston that they have a right to exist. We reject any notion that voluntary groupings of people in sections of the city on the basis of ethnic background is a throwback to the medieval age. Such areas as East Boston, South Boston, Roxbury and Charlestown can teach us much about the enduring value of helping our neighbors, of family, of heritage.

The spirit of these neighborhoods has been one of the principal reasons why Boston has been known everywhere as one of the most livable cities in the nation. They must not lose their identity.

What some in the neighborhoods have not learned is that each must live at peace with the others, that each does not and cannot exist in a vacuum, that all are part of Boston. It is true of neighborhoods of Boston, today, as it was of the 13 colonies 200 years ago, that we must all hang together or we will all hang separately.

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8. Boston is a city of neighborhoods, delineated by ethnicity, housing patterns, history, geography and culture. The city is strong when these diverse neighborhoods use their strengths and sense of pride to pull together to meet a common enemy. The perception of some is that instead of fighting against unemployment, inadequate housing, crime, drugs and poverty, we are witnessing the poor whites contesting the poor blacks in an internecine struggle that threatens the city's very existence. On the other hand, the majority of the anti-busing community perceives the situation not as a class of racial struggle but as a question of freedom and individual prerogatives.

9. Everyone outside of Boston asks, "Why are the leaders silent?" Many leaders are not silent. No one in a leadership position seems to be neutral, and if any "leader" tries to speak with moderation, serve on a biracial council, try to show some understanding of the other side of the issue, then he or she runs the risks of being no longer a leader. The moderate is silenced by fear; the compromised loses his or her constituency; the militant ("unconditiontial surrender") individual becomes the spokesperson; and the sickening cycle of "vituperative rhetoric — assault — retaliation — increased fear" goes on and on in ever-increasing intensity.

10. It was strongly represented to us that many of the constituents among those who oppose court-ordered busing, as well as among those who support busing, are without forceful political leadership at the highest level. The former group believes that 80 percent of the citizenry at large agree on an anti-busing position, and yet there is no support for this position by the Governor, by any of the Congressmen or by any of the others in the highest elective offices. The latter group feels that whatever support is given to the implementation of the court-order is, for the most part, reluctant, conflicting and soft. This lack

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of representation tends to strengthen the hands of those who claim that moderation will not succeed.

2. Public Safety

a. Boston Police

1. In the opinion of some, the Boston Police Department is in desperate need of black officers and administrators. (There are 2300 police officers of whom less than 130 are women, and minorities. In 1972 it was less than 100.)

2. The Civil Service list is not yet published, and the city has an austerity program. But Boston needs more police officers, black and white, particularly for neighborhood foot patrol, and it needs them now.

3. The police have done a commendable job in cutting down on school disturbances. But in the opinion of some experts, police presence in schools is counterproductive to the creation of an educational environment and has resulted in school administrators neglecting their jobs as disciplinarians.

4. There is a perception in most communities that there is uneven enforcement of the law both by police and the courts.

b. State Law Enforcement

1. As is true of the Boston police, State and MDC police have been effective in preventing violence within schools, but there is a question in the minds of some as to whether or not any student can learn in a concentration camp atmosphere.

2. The Attorney General and District Attorney are working with the police departments in a "Special Violent Crime Unit." Some believe that this unit has potential to act as a deterrent through speedy arrest and prosecution, but it has not been fully tested as yet.

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c. Federal Law Enforcement

1. There is strong evidence that an active Federal presence would result in a softening of the intensity of school-related violence. But the same philosophy that police presence in the school is inimical to good education would necessitate that such federal presence within school buildings should be avoided, and their presence immediately outside of school buildings should be as subtle as possible.

2. While in most cases the "street crimes" lend themselves more readily to state prosecution, an argument could be made that the Federal laws covering civil rights, inciting to riot, and potential XIVth Amendment Constitutional equal-protection violations could be more effectively prosecuted by Federal authorities.

3. There is, however, considerable anger on the part of those who believe that Federal law enforcement has been, in the past, one-sided. It must be emphasized that any increased Federal involvement must be even-handed.

d. Judge W. Arthur Garrity, Jr.

1. There is no neutral feeling about Judge Garrity. Some believe that Judge Garrity is the most intelligent and courageous judge on the Federal bench. Others allege that he has a lack of knowledge of and lacks an interest in the affected communities, that he acts as he does because he is unaffected by his rulings, that he refuses to listen to experts, like James Coleman, who disagree with him, and that he is arrogant, stupid, and evil incarnate.

2. Typical of the lack of information, or availability of misinformation, few people seem to be aware that Phase I, the original desegregation plan, was drawn up by the State Board of Education not by Judge Garrity, and ordered by the Supreme Judicial Court of Massachusetts. When the matter was brought before Judge Garrity under

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a suit alleging violation of equal protection under the XIVth Amendment, Judge Garrity ordered the Boston School Committee to carry out the plan drawn up by the State and ordered by the Supreme Judicial Court.

3. Judge Garrity ordered Phase 2, which was his plan, and in endeavoring to assure that the plan is implemented, he has been drawn deeper and deeper into controlling the working details of the school system.

4. Without passing judgment on whether or not the degree of Judge Garrity's involvement in school matters is or is not a breach of the separation of judicial, legislative and executive powers, the extent to which the Superintendent feels a need to respond to the court, independent of, sometimes adverse to, and often without consulting with, the Boston School Committee, has created an administrative nightmare in the school department. This is not intended as adverse comment on the Superintendent's ability or dedication, but, rather, it is recognition of a situation where the chief executive officer of the schools is giving orders to School Department personnel which she received from Judge Garrity and which orders the School Committee might oppose. The School Department personnel have divided loyalties between the Superintendent, who has been given the order from the federal judge, and the Boston School Committee, which will make their assignments, choosing instead to follow what they viewed as the mandate of their constituency, grant their promotions and determine their future.

5. The refusal of recalcitrant members of the School Committee to carry out the Phase 2 plan led to unusual judicial involvement. This same involvement has made Judge Garrity a symbol in the school controversy. He has become a symbol, and, as such, he serves as the rallying point and the object of the slogans and epithets of the antibusing movement in our city. That movement

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sees the aggregation of too much power to one Federal judge as the major cause of the school problems in Boston.

3. **Unemployment**

a. Unemployment does not fall evenly to the whole population. Blacks, women, young people, low income or unskilled, those least able to bear the rigors of unemployment, are called upon currently to bear the largest burden. The economic slump in Massachusetts and the nation, with resulting unemployment of blacks and whites, occurred during the same period of time as the order regarding desegregation.

b. While busing is viewed by many as the cause of violence, others maintain that busing is the symptom, not the sickness. The sickness, some contend, is that people live in substandard housing, with no money, no work and no hope. They have become bitter, angry and frustrated. They see no way out of their misery, and this only exacerbates the situation. They see neighbors with good-paying jobs sending their children to private schools. They see those with better-paying jobs living in the suburbs, where, they believe, you don't have to fear opening your door or walking down the street. They also see that society and the establishment orders their children bused. Then, the whole focus of their grievances is directed toward that issue.

c. Affirmative action programs cause the whites to feel that they are being denied jobs and promotions because of special treatment for the blacks. They perceive quotas, change in test scores, and special preferential hiring policies as discriminatory. The blacks, who have an unemployment rate nearly double that of whites, feel that the whites are keeping blacks out of the unions, and by not allowing them to have an equal opportunity in the job market, are denying them job opportunities.

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d. The housing industry has had the fewest number of housing starts since just after World War II. Unemployment in building trades has approached 50%. No wonder each new project sees a power struggle for the few available jobs. Each side believes the other is getting an unfair advantage (whites because of unions and blacks because of affirmative action plans) when, in reality, they are both suffering.

4. Housing

a. Boston is an old city, and its housing in the inner city is therefore, old, inadequate, often unsafe and unsanitary. Some believe that this housing environment gives constant visual evidence of the lack of future promise and the absence of hope for tomorrow. This absence of hope, the inability to "see a way out", is a major contributing factor to the feeling of frustration.

b. Bank and insurance companies have been accused of "redlining", the core city area, i.e. drawing a red line around sections of the city, classifying the area so encircled as "high risk," and either refusing to finance or insure home and apartment maintenance and rehabilitation or doing so at rates that are prohibitive.

c. It is the contention of some that the Massachusetts Housing Finance Agency (MHFA) and the Federal Housing Administration (FHA) have adopted a highly selective process for financing or insuring housing in the core city area.

d. Without a program of rehabilitation of housing in the inner city, the existing housing will cross the fine line separating outmoded living accommodations from blighted, unsafe and uninhabitable conditions.

e. The existing housing inventory represents a priceless commodity which, in these times of shortages of building materials and supplies, should be preserved and uti-

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lized to the maximum extent possible. This makes sense not only from the economics of construction but also from the viewpoint of social upward mobility.

f. Public Housing Projects:

1. The Public Housing Projects in various sections of our city (e.g., Columbia Point, "D" Street, Maverick Square, Mission Hill, Bromley Heath, Orchard Park, etc.) are poorly located, ill-planned and in such a state of physical disrepair that the chief judge of the Boston Housing Court has seen fit to order the Boston Authority to rehabilitate them forthwith.

2. Project areas have had insufficient security so that the inhabitants have been terrorized and have been forced indoors in constant fear, and visitors have been afraid to come to respond to emergency calls from some public housing complexes for fear of their lives.

3. The problems in these projects pre-date the busing controversy, but in certain instances, anti-busing has been used to justify conduct that is otherwise unconscionable and intolerable.

4. Community action groups such as CDC in East Boston, RAP and TDC in Roxbury, IBA in the South End, etc. have made significant contributions in rehabilitating abandoned or blighted buildings and in converting them into safe and decent "scattered site" housing. Some say this has permitted some tenants eligible for public housing to move from a project with its plywood checkerboard appearance to a new and beneficial environment. Such community sponsored activity is now made possible by judicious utilization of federal subsidization through "Section 8 Leased Housing" programs.

5. Leadership

a. As stated above, there is much comment about a "leadership vacuum" in Boston, but many people feel that

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the polarized portions have too many leaders making too many statements. There is no voice of moderation that speaks for (or is listened to by) all the factions in our city. There has been an inability on the part of Boston's collective leadership, to take steps that could educate, mollify or command in a manner that would ease some of the racial tensions.

b. Political leadership

1. There has been altogether too much divisive and inflammatory rhetoric by political leaders.

2. Many leaders believe that any effort to conciliate or arbitrate will result in a loss of the leadership position. We cannot accept this. It has been said of trade unions that a test of leadership is not the ability to incite one's following to walk out, but, rather, the capacity to get the members to accept the labor-management contract made and to follow him or her back to work. That same test of leadership is present in the busing controversy. Political and community leaders must do more to meet this standard.

3. Many people feel that you, Mr. Mayor, have not done all that is to be expected of this city's chief executive. Because you have made an effort to be passively understanding of both points of view, you have been criticized by white leaders for "waffling" on the issue of busing, not taking a leadership role against violence and for capitulating to the judge on fiscal issues. Blacks feel you have defaulted in leadership duties by not wholeheartedly supporting a court order, by not providing moral leadership on the issue of violence.

4. The majority of the members of the City Council are considered to be members of the antibusing forces in this city. In the opinion of some, by opposing the law, urging greater resistance and making impassioned speeches on one side of the busing issue, they have raised serious

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doubts as to whether or not they represent the entire city or a narrow constituency. However, in the opinion of others, they have reflected the majority perspective.

5. The School Committee's spending so much time quarreling over patronage and prerogatives has been, to some, a factor in its inability to provide the leadership necessary for us to reach our potential as the best public school system in America.

6. Members of the state legislature have, as would be expected, represented the views of their representative districts. They have agreed to work together on the issue of jobs, which is a very healthy sign.

7. Church leaders have, for the most part, either been silent or said the wrong thing at the wrong time. If there is a leadership vacuum, it is in the area of moral persuasion which is the responsibility of our spiritual leadership.

8. News media, including newspaper, radio and television, have shown greater interest in reporting the dramatic wrong than informing the people about that which is not terribly exciting but is right. There are those who say there is a direct relationship between the coverage given demogogues and those prone to violence and the intensity of their activities in the presence of a camera or reporter.

On the other hand, criticism of the media comes from both sides. Members of the anti-busing movement are also upset that the media has slanted the coverage against them by unfair portrayals of pervasive racism. Both sides feel that favoritism is given the other side in coverage of racial incidents.

9. Black leaders have not called for violence but actions that provoke and will predictably lead to interracial clashes serve neither the black community nor the city well and should be avoided.

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10. Some point out that business leaders are not meeting their responsibilities in developing a significant moderate element in the city. As with political, religious and new leaders, there are some business leaders who are taking that extra step to be of service, but they are the exceptions, not the rule. Others argue that it cannot fall upon the shoulders of businessmen to solve the city's problems.

11. Each community and neighborhood has leaders in opposition. We do not fault their advocacy of positions of their constituencies, so long as it is a reasonable exercise of free speech. However, their rejection of anyone who indicates a willingness to serve in a moderate capacity (even though that person's motivation is to get the best possible education for his or her child, irrespective of political or social views) will only increase tensions, prevent accommodation on non-busing, non-school issues, and ultimately hurt the very people those leaders are out to help.

12. One plan that was mentioned, supported by some but not developed in depth, is the voucher plan, whereby each child would be awarded a voucher redeemable for the per-pupil cost of a public school education at the school of the parent's or guardian's choice.

6. **1970-71 "Commission on Violence Report on the Public Schools."** a. Since it has been repeatedly asserted that the racial violence in the schools and in the city is a new phenomenon that resulted from "Judge Garrity's busing order," we thought it appropriate to quote from a report made by an unpaid commission, similar to our committee.

1. The Commission was created "In response to a communication from (the Boston City Council) regarding a pattern of violent incidents both within and immediately outside the Boston schools . . ." (p. 1).

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2. "Unquestionably the administrator is the key person in the prevention of violence in the schools. Principals and headmasters who have a deep commitment to education, who maintain a single standard, who mingle constantly with students and teachers and who perform public and community relation functions usually run satisfactory schools." (p. 4)

3. "Boredom and restlessness inevitably lead to disruptive behavior." (p. 4)

4. "In no single area was there greater unanimity regarding the cause of violent incidents than with rumor and its effect on the school's proper equilibrium. Simple incidents can easily be distorted or aggravated. Rumor, given credence by newspaper, television and word of mouth, was often allowed to run rampant, with administrators unable to get facts in order to ascertain the truth. Rumors which often seemed to grip a school and a community contributed to greater unrest and disruptions." (p. 5)

5. "The economic level of the student's home is, in most cases, related to his behavior in the classroom . . . many poor students come to school 'up-tight' frustrated and angry. The consequences of poverty are often overlooked as the causes of violence in our schools." (p. 6)

6. "Segregationists, white and black, are ready to exploit every opportunity for disrupting the schools. The tolerance that exists between some white students and some black students is on the surface only. Time for constructive action is running out if we are to prevent polarization." (p. 7)

7. "The mere presence of TV cameras and equipment is almost certain in itself to cause disturbance." (p. 9)

8. "Almost every person interviewed by this Commission echoed in his own way the belief that Boston school problems are only a microcosm of those affecting our larger populace. Unrest, anger, poverty, drugs and

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confrontation are not unique to our schools or to our city." (p. 9)

9. "There is little doubt to the daily or even to the casual observer of our school system that our educational system will remain in chaos as long as society at large remains in a state of crisis." (p. 10)

IV. Recommendations

A. We recognize and affirmatively assert that these findings and recommendations are based upon a limited number of meetings with a few selected individuals and, therefore, must be considered in a different light than would such findings be considered if they were the product of a lengthy and thorough investigation. However, time is a luxury we had to do without, and the fear and potential for violence that grips our city must be addressed without delay.

Of one thing we are confident, and that is that something must be done. If this report helps you in your deliberations and prompts you to take the action recommended herein, take action different from that which we recommended or even take action that we have not contemplated or recommended, then the time, the energy and the effort will have served a very useful purpose.

B. *Action by the Mayor*

1. You should become the active leader of our city by word and by deed. You should start making a series of strong statements on the issues of jobs, civic pride and spirit. The Court's desegregation order is the law unless, and until, it is modified by the U.S. Supreme Court in future litigation or by legislation. You don't have to agree with the judge's decision, but you did take an oath to support the laws of this state and this nation. Therefore, you should encourage the majority which wishes to change the law to act within the confines of the judicial or legislative process.

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2. You should organize a committee similar to this body. a. The Committee should have recognized and respected representatives of the minority and white communities, business and/or financial leaders and religious spokespersons. b. The committee should have no more than 10 or 12 members. c. The committee's main responsibility should be to meet with and attempt to unify all civic and community leaders on behalf of a program of non-violence and civic stability. d. The committee should serve as a vehicle for addressing, mediating and/or conciliating differences which could embroil the city in violence or conflict.

3. Organize jobs and other activities for the young people, black and white, who are out of school and unemployed.

4. Institute a series of programs to restore some spirit and pride in the city and its neighborhoods. Young people should be utilized in recreation areas and in clean-up campaigns. The various communities can be pulled together by Little City Halls, etc. for neighborhood activities unrelated to the divisive school issue.

5. Expand the athletic and recreational facilities of the city, particularly on hot summer nights and on weekends. Every effort should be made to fund these programs through private sources rather than tax dollars.

6. Support the law enforcement programs, including an expansion of the police force and the Special Violent Crime Unit.

7. Initiate steps to determine the conditions under which expanding the Boston School Committee would be feasible, with particular attention given to district representation.

8. In addition to the summer jobs for youth, a long-term, year-round plan for employment of young people, in and out of school, should be set in motion.

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Again, the funding for this should not be burdensome to the taxpayer.

C. *Action by Judge Garrity*

Although we choose not to make direct recommendations to Judge Garrity, we make the following recommendations which we hope you will have your Corporation Counsel communicate to the court.

1. As soon as he is satisfied that the Boston School Committee will carry out the court's orders, he should step aside and turn the responsibility for running the schools back to the Boston School Committee.

2. He should find conditions under which he will remove South Boston High School from receivership and allow the South Boston community to make that school an integral part of the school system.

3. The CCC as presently constituted should be abolished, replaced by a smaller committee and should be given authority to act for the court so that every dispute or minor controversy will not be the subject of judicial proceedings. If Judge Garrity were to turn over the responsibility for the administration of the schools back to the School Committee, then a revitalized CCC, given proper authority, could be an effective watch dog. This Committee feels strongly that with the right membership, proper guidelines and sufficient authority, the CCC could make a significant contribution toward providing more light and less heat in the school controversy.

D. *Boston School Committee*

1. The Committee should satisfy the court that it is willing to carry out the obligations of its elective office.

2. It should end the present unworkable relationship between itself and the Superintendent.

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3. The Committee must, without abrogating its powers, more fully involve the colleges, universities, businesses and labor organizations in its school program. Those who are providing such help should not be treated as outsiders or interlopers but, rather, as a source of talent and expertise which can enrich our school system.

E. *Other Recommendations*

1. Jobs should be obtained from whatever legitimate sources are available. These jobs should be used to revitalize neighborhoods, operate parks and recreational facilities on evenings and weekends and should be employed so as to help instill a new vibrancy in our city and its neighborhoods.

2. The police force should be increased and more efficiently utilized. Patrolmen should have a high visibility in all neighborhoods, particularly those with a high crime rate.

3. There should be a uniform code of discipline in our schools, and it should be promulgated in time for implementation at the opening of the school year in the fall of 1976.

4. As soon as the proper authorities are satisfied as to student safety, police should be removed from the schools, and teachers, principals and headmasters should be in charge of discipline.

5. One concept on which there was some interest from many sides is that of "community control of schools." It means different things to different people, but some further exploration in this direction might serve to find some common ground for compromise between factions that view their positions as irreconcilable.

6. Title I money should follow the child, regardless of where he or she attends school.

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7. The church leaders should educate their community. It is not enough to issue high moral pronouncements; these leaders should explain to their members the reasons for official action and the reasonable alternatives. The credibility of church leaders uniquely enables them to inform where there is no information and allows them to correct erroneous conclusions based on misinformation. Care, of course, must be exercised to strictly preserve the Constitutional separation of church and state.

8. Black and white state legislators should continue to meet on jobs, but they should expand their agenda to include housing, health care and the free exchange of information on all issues that divides their constituencies.

9. All citizens, black and white, should be guaranteed the right to travel in safety in any section of the city. Police should work with neighborhood organizations to establish a communication system with the schools and law enforcement agencies to help make streets safe to travel, schools safe to learn in and prevent a minor incident from developing into a major confrontation.

10. We are witnessing in Boston a new form of violence: the use of terrorism as a political weapon. The smashing of store windows, the defacing of public landmarks, the destruction of historical shrines are examples of the stepped-up pace of violence in the city. We, as all decent people in Boston, feel a sense of shame at these outrages against public order and senseless abuse of national monuments. There is no partisan advantage in such tactics. It shames the city. We repudiate such acts and ask for vocal opposition to them from the city's leaders. Silence before these intolerable acts only encourages more and worse ones.

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Conclusion

This city desperately needs a restoration of human spirit, a renewal of that feeling of brotherhood, understanding and love that so characterized our past.

It is not enough to say that the whole nation is depressed, and, therefore, we must be a sad city. This need not be.

Nor must we be bitter and angry because others in this country so react to disappointments and frustration.

We believe that, in at least this area of life, the area of human relations, nostalgia can be well worthwhile. Let us look at and emulate our recent past, when a young man from Massachusetts had to put aside our selfish interests to ask what we could do for our country and our fellow man; and look at the past of two hundred years ago when the sense of values related not to wealth, creature comforts or the lack thereof, but to freedom, liberty and equality for all.

Boston can lead Massachusetts, and Massachusetts, the nation, in a renaissance of love, in a rebirth of our spirit and in a renewal of our faith in one another and in ourselves.

We ask you, Mr. Mayor, to lead a crusade to bring this about.